Petition

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In the Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether a marine construction worker injured on actual navigable waters is "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), and is thus covered under the Act.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, claimant Raymond Churchill and Hartford Accident & Indemnity Company are respondents in this Court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	17
Appendix A	1a
Appendix B	7a
Appendix C	9a
Appendix D	29a

TABLE OF AUTHORITIES

Cases:

Brown v. *Hydro-Dredge Corp.*, B.R.B. 79-721 (June 11, 1981) 17
Calbeck v. Travelers Insurance Co., 370 U.S. 114..7, 14, 15
Davis v. *Department of Labor*, 317 U.S. 249 14
Duncanson-Harrelson Co. v. *Director, OWCP*, 644 F.2d 827 16
Fusco v. *Perini North River Associates*, 601 F.2d 659, vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111, cert. denied, 449 U.S. 1131 ..... 3, 5, 6, 10, 11, 13, 16
Gilliam v. *Wiley N. Jackson Co.*, No. 80-5804 (5th Cir. Oct. 15, 1981) 15
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 14
Hardaway Contracting Co. v. *O'Keeffe*, 414 F.2d 657 8
Holcomb v. *Robert W. Kirk & Associates, Inc.*, 11 B.R.B.S. 835, petition denied, 655 F.2d 589....10, 11, 13

Cases—Continued Page

Nacirema Operating Co. v. *Johnson*, 396 U.S. 212.. 7
Nogueira v. *New York, N.H. & H.R.R.*, 281 U.S. 128 7
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 .....7, 8, 9, 10
Northern Coal & Dock Co. v. *Strand*, 278 U.S. 142 14
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 .....7, 8,10, 11, 12, 13
Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 7
Ramos v. *Universal Dredging Corp.*, 10 B.R.B.S. 368, rev'd, 653 F.2d 1353 17
Sedmak v. *Perini North River Associates*, 9 B.R.B.S. 378, rev'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659, vacated and remanded, 444 U.S. 1028, aff'd on remand, 622 F.2d 1111, cert. denied, 449 U.S. 1131..... 5
Southern Pacific Co. v. *Jensen*, 244 U.S. 205 12
Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 .....5, 7, 15
Travelers Insurance Co. v. *Branham*, 136 F.2d 873.. 8
Walter Tantzen, Inc. v. *Shaughnessy*, 601 F.2d 670 rev'd on remand, 624 F.2d 5 10
Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957 16

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. 901 *et seq.* 4
Section 2(3), 33 U.S.C. 902(3) 2, 5, 6, 8, 9, 11, 12, 13
Section 2(4), 33 U.S.C. 902(4) 7
Section 3(a), 33 U.S.C. (1970 ed.) 903(a).... 7
Section 3(a), 33 U.S.C. 903(a) 2, 8, 9
Section 19, 33 U.S.C. (&. Supp. III) 919.... 4
Section 21(b)(3), 33 U.S.C. 921(b)(3)..... 5
Section 21(c), 33 U.S.C. 921(c) 5

Miscellaneous:

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972).. 9
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972).... 8, 9

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PERINI NORTH RIVER ASSOCIATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is reported at 652 F.2d 255. The opinion of the Benefits Review Board (App. C, *infra*, 9a-28a) is reported at 12 B.R.B.S. 929. The decision of the Administrative Law Judge (App. D, *infra*, 29a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 7a-8a) was entered on June 17, 1981. On September 8, 1981, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including November 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

2. Section 2(3) of the Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

STATEMENT

1. Raymond Churchill, an employee of respondent Perini North River Associates, was injured in a job-related accident at the site of the North River Pollution Control Project, a sewage treatment plant under

construction on the Hudson River in New York City (App. A, *infra*, 3a). Perini had contracted to build the foundation or substructure for the plant, which extends approximately 700 feet over the Hudson River between 135th and 145th Streets in Manhattan (App. D, *infra*, 30a). The construction contract required Perini to "place 2,300 hollow circular pipes, called caissons, in navigable waters down to imbedded rock, to fill the caissons with concrete, to connect them together at proper elevations above the water with concrete beams, and to place precast concrete slabs on top of the beams." *Fusco* v. *Perini North River Associates*, 601 F.2d 659, 661 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981).[1] Employees on the project worked from barges (T1 28, 29; T2 124)[2] and float stages (T2 116, 117) or from parts of the uncompleted substructure.

Raymond Churchill is a dockbuilder foreman and has been a member of the dockbuilders' union for more than 20 years (App. A, *infra*, 3a). On this particular project, Churchill was in charge of all work performed on one of the crane barges used to set caissons in position for driving into the river bed and to load and unload construction materials from

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[1] This description of the project was adopted by the court below (App. A, *infra*, 3a).

[2] At the September 25, 1978 hearing in this case, the administrative law judge accepted, in lieu of live testimony, a transcript of the testimony of the project manager, Charles Edgar, taken at an April 12, 1978 hearing involving similar issues. References to "T2" are to the transcript of Mr. Edgar's testimony, while references to "T1" are to the transcript of the hearing in the instant case.

supply barges (App. C, *infra*, 11a-12a, 14a-15a; T1 27-29; T2 120). Churchill was injured on the deck of his crane barge on October 9, 1974, while giving signals to a crane operator engaged in unloading a caisson from a supply barge (App. D, *infra*, 30a; T1 32-34). As the caisson was being lifted, the "tag line" attached to the bottom of the caisson to keep it from turning suddenly became taut and struck Churchill with enough force to hurl him about 15 feet (App. A, *infra*, 3a; T1 34-36), resulting in injuries to his left leg, thumb, and head (App. D, *infra*, 30a).

2. Churchill filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* Respondent Perini denied that Churchill was covered under the Act, and the case was referred to an administrative law judge for a formal hearing on the coverage issue, pursuant to Section 19 of the Act, 33 U.S.C. (& Supp. III) 919. After an evidentiary hearing, the ALJ held that Churchill's injury was not covered under the Act. The ALJ concluded that Churchill was not "engaged in a maritime employment" because his job did not have a significant relationship to navigation and commerce over navigable waters (App. D, *infra*, 31a):

> It is determined here that claimant's employment was not maritime in [the] traditional sense, but was customary construction work. Indeed, it is typical of the support tasks performed for any construction project—irrespective of location. Mere construction over navigable water here does not magically convert his work, lacking even a remote connection to navigation and commerce, into maritime employment.

Churchill and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Re-

view Board pursuant to Section 21(b)(3) of the Act, 33 U.S.C. 921(b)(3). The Board consolidated the appeals with five other cases involving Perini employees, and affirmed the ALJ's denial of coverage by a 2-1 vote (App. C, *infra*, 11a-16a). Relying on the Second Circuit's second decision in *Fusco* v. *Perini North River Associates*, 622 F.2d 1111 (1980),[3] which involved the same employer and construction of the same project, the Board held that marine construction workers building facilities that are not ultimately used in navigation or commerce over navigable water are not engaged in "maritime employment" (App. C, *infra*, 13a).[4] The Board also rejected the contention that Churchill's duties, involving unloading construction materials from barges, were alone sufficient to bring him within the Act's coverage as a "person engaged in longshoring operations" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (App. C, *infra*, 14a-15a).

Churchill sought review of the Board's decision in the court of appeals pursuant to Section 21(c) of the Act, 33 U.S.C. 921(c). The Director participated as a respondent and filed a brief in support of Churchill's petition for review. The court denied the peti-

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[3] See note 8, *infra*.

[4] Board Member Miller dissented, relying on his extensive dissent in the *Fusco* litigation, in which he argued that a job can be "maritime" without having a direct relationship to navigation or commerce (App. C, *infra*, 17a-22a). *Sedmak* v. *Perini North River Associates*, 9 B.R.B.S. 378 (1978), rev'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981). He also stated that this Court's rationale in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), compelled a finding of coverage (App. C, *infra*, 22a-28a).

tion. Notwithstanding the fact that Churchill was injured while unloading a barge upon actual navigable waters, the court concluded that his employment was not "maritime" within the meaning of Section 2(3) of the Act because it lacked a "significant relationship to navigation or to commerce on navigable waters" (App. A, *infra*, 2a n.1).

REASONS FOR GRANTING THE PETITION

This case presents a significant unresolved question under the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972. The court of appeals has held that a marine construction worker who was injured while performing his regular duties over actual navigable waters was not "engaged in maritime employment" within the meaning of the LHWCA. In so holding, the court has denied coverage to a worker who unquestionably would have been covered before the 1972 amendments to the Act[5]—amendments that were designed by Congress to extend, not to contract, federal coverage. Furthermore, the test used by the court below to determine coverage revives formerly resolved uncertainty regarding application of the Act to injuries received on actual navigable waters and creates substantial difficulties in administration of the Act, particularly in marine construction coverage cases. This decision warrants review by this Court.

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[5] This case is therefore materially different from *Fusco* v. *Perini North River Associates*, *supra*. Although that case involved the same employer and construction project, the government opposed the petitions for certiorari in *Fusco* because the record there failed to establish definitively "that [the claimants] would have been covered under the pre-1972 Act." Brief for Federal Respondent in Opposition, Nos. 80-639 and 80-651, at 18.

1. This case squarely presents an important issue concerning the 1972 amendments to the LHWCA that this Court noted but left unaddressed in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977): "whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined."

Prior to 1972, courts focused solely on the location of the injury to determine whether the Act applied. Former Section 3(a), previously codified at 33 U.S.C. (1970 ed.) 903(a), provided that compensation was payable for any "injury occurring upon the navigable waters of the United States (including any dry dock) * * *." The general rule was that all injuries sustained on actual navigable waters were covered under the Act while those incurred on land were not.[6] *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 718 (1980), quoting *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 124 (1962) (prior to 1972 "LHWCA comprehended 'all injuries sustained by employees on navigable waters' "). See also *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 72-73 (1979); *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 218-220 (1969). Marine construction workers, in particular, were covered as long as they were injured on navigable waters. This was true regardless of whether the

[6] If an employee was injured in the course of his employment while on navigable waters, the courts assumed that his employer necessarily had an employee engaged in "maritime employment," as required by Section 2(4) of the Act, 33 U.S.C. 902(4). The necessary maritime connection was established even if the particular employment on the water was the kind of job typically performed on land. See *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334, 340-342 (1953); see also *id.* at 342-343 (dissenting opinion); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128, 131-132 (1930).

project under construction was intended to aid navigation or commerce on navigable waters. Compare *Travelers Insurance Co.* v. *Branham*, 136 F.2d 873 (4th Cir. 1943) (labor foreman building dry dock), with *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F.2d 657 (5th Cir. 1968) (laborer building bridge).

In 1972, however, Congress moved the coverage of the Act shoreward. *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 260. Under the amended Act, coverage was extended to any "employee" injured upon new, broadly-defined "navigable waters," which included "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel * * *." Section 3(a), 33 U.S.C. 903(a). Eligible "employees" were defined as persons "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *." Section 2(3), 33 U.S.C. 902(3). Thus, Congress sought to provide benefits to all workers engaged in maritime employment who receive an injury on the broadly defined navigable waters.

The indisputable congressional purpose behind the 1972 amendments was to expand coverage under the Act "to protect *additional* workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). See *P.C. Pfeiffer Co.* v. *Ford*, *supra*, 444 U.S. at 73; *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 251. The legislative history of the 1972 amendments clearly demonstrates that Congress did not intend to exclude from coverage any employees who are injured on actual navigable waters and who therefore would have been covered under the original Act. The amendments to Section

2(3) of the Act, defining "employee," and to Section 3(a), the general coverage provision, were discussed in both the Senate and House committee reports under the heading: "Extension of Coverage to Shoreside Areas." S. Rep. No. 92-1125, *supra*, at 12-13; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). The unmistakable assumption of the committee reports is that the existing coverage of the Act would remain intact.[7] Indeed, in its section-by-section analysis of the statutory changes, the Senate committee stated (S. Rep. No. 92-1125, *supra*, at 16 (emphasis added)):

> [Amended Section 2(3)] specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * *.

In holding that Churchill is not eligible for benefits under the LHWCA, despite the fact that he was injured while working on actual navigable waters and would have been entitled to federal benefits prior to 1972, the court of appeals' opinion disregards Congress' intent to retain coverage for traditionally covered employees and runs counter to this Court's instruction that the Act be liberally construed with "an

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[7] Such an assumption is not inconsistent with the fact that coverage under the amended Act hinges on "both the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 265. A worker, like Churchill, injured on actual navigable waters is perforce engaged in maritime employment at the time of injury. Churchill's employment, for example, required the use of barges, float stages, life jackets, and special procedures for construction on water, and exposed him to conditions of employment that were uniquely maritime.

expansive view of [its] extended coverage." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 268.

The decision below, moreover, is inconsistent with the Fifth Circuit's recent decision in *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, 655 F.2d 589 (1981). While the Second Circuit rejected the contention that "the 1972 Amendments were not meant to remove pre-existing coverage" (App. A, *infra*, 4a), the Fifth Circuit in *Holcomb* concluded that "the 1927 statute had coverage provisions which were not withdrawn by the 1972 amendment." 655 F.2d at 592. Quoting from the Second Circuit's first opinion in *Fusco* v. *Perini North River Associates*, *supra*, 601 F.2d at 666,[8] the Fifth Circuit stated that, in enacting the 1972 amendments, " 'Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing

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[8] In *Fusco*, the Second Circuit initially held that claimants working on the same marine construction project involved here were covered under the Act. The court ruled that "any person whose principal duties are performed on navigable waters as that term was understood before 1972" remained covered under the amendments. 601 F.2d at 669. As explained in another case decided the same day, however, the court believed that *only* those persons whose principal duties were performed on actual navigable waters were covered by the Act. See *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979). Both the *Fusco* and *Walter Tantzen* cases were vacated and remanded by this Court in light of *P.C. Pfeiffer Co.* v. *Ford*, *supra*, which rejected the argument that the amendments covered only those who are working or may be assigned to work over actual water. On remand, the Second Circuit reversed its position and adopted the "significant relationship to navigation or to commerce" test in *Fusco* (622 F.2d at 1113) and found coverage for an injury sustained by a land-based longshoreman in *Walter Tantzen* (624 F.2d 5 (1980)).

existing coverage or eligibility.'" 655 F.2d at 593. The Fifth Circuit therefore relied on pre-amendment cases to hold that a vessel watchman injured on actual navigable waters was covered under the amended Act, emphasizing that coverage was at least in part dependent on the fact that the watchman was "injured aboard ship." 655 F.2d at 593. Thus, the Second and Fifth Circuits have reached conflicting conclusions regarding whether the amended Act withdraws coverage from injuries occurring upon actual navigable waters. This Court should grant review to resolve this conflict between the two major maritime jurisdictions.

2. Review by this Court is particularly appropriate because the court of appeals' opinion in this case is based upon an erroneous interpretation of *P.C. Pfeiffer Co.* v. *Ford*, *supra*. The Second Circuit in *Fusco* v. *Perini North River Associates*, *supra*, originally held that workers injured on actual navigable waters are covered under the Act because Congress in passing the 1972 amendments did not intend to withdraw coverage from workers previously subject to the Act. 601 F.2d at 669. After *Fusco* was remanded for reconsideration in light of *Ford*, the court of appeals changed its view and held that "maritime employment" under Section 2(3) of the amended Act requires a significant relationship to navigation or to commerce on navigable waters. 622 F.2d at 1113. *Ford*, however, does not support that proposition, and nothing in this Court's opinion was intended to withdraw from the category of maritime employees those persons who are injured while working on actual navigable waters.

Persons who are injured upon actual navigable waters are precisely the kind of employees Congress had in mind when it enacted the LHWCA. They are the persons who most need the protection of a federal

compensation remedy because their injuries occur at a place that, under *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917), may not be reached by state workers' compensation laws.[9] The claimants in *P.C. Pfeiffer Co.* v. *Ford*, *supra*, were not such workers. Their injuries did not occur on actual navigable waters. Indeed, the question before the Court in *Ford* was whether land-based cargo handlers could be "engaged in maritime employment," and therefore covered under the Act, even if they were not subject to assignment aboard a vessel in the course of their working day. The question, in short, was whether workers could be engaged in maritime employment even if they never worked on actual navigable waters. In this context, the Court emphasized that the phrase "maritime employment," as used in Section 2(3), has an occupational content and does not focus exclusively on the locus of a person's workday activities. 444 U.S. at 78-81. The Court, therefore, held that two marine terminal workers engaged in the process of transferring cargo between sea and land transportation were engaged in maritime employment by the very nature of their work, even if they were never required to perform any tasks on actual navigable waters. The Court reached this result in part because Congress specified in Section 2(3) that the phrase "person engaged in maritime employment" includes "any longshoreman or other person engaged in longshoring operations * * *."

The Court never suggested, however, that the location of a person's injury is irrelevant to the question whether he is "engaged in maritime employment" or

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[9] While state law prior to 1972 could apply to injuries over navigable waters occurring within the "maritime but local" zone, state workers' compensation remedies could not reach an injury where the claimant's employment had a direct relationship to navigation or commerce. See page 14, *infra*.

that a person who is injured on actual navigable waters is not "engaged in maritime employment" unless his work "bear[s] a significant relationship to navigation or to commerce on navigable waters" (*Fusco* v. *Perini North River Associates*, *supra*, 622 F.2d at 1113). The Court in *Ford* had no occasion to address such matters because they were not germane to the claimants whose coverage under the Act was then in dispute.

The fact is that the phrase "maritime employment," as used in Section 2(3), has both an occupational and a geographic content. The Court's decision in *Ford* was not intended to exclude the latter in favor of the former. By requiring a "significant relationship to navigation or to commerce on navigable waters" as a precondition to coverage under the Act, even for employees who are injured on actual navigable waters, the court of appeals has adopted a test that in many instances will re-create the very problem the LHWCA was initially intended to solve, *i.e.*, the potential unavailability of any compensation remedy for persons injured on the navigable waters of the United States.[10]

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[10] Indeed, *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, *supra*, presented just such a bizarre scenario. Holcomb first pursued a claim for workmen's compensation benefits under Florida law, which was denied on the ground that his injury fell within the coverage of the LHWCA. 655 F.2d at 590. His subsequent claim under the LHWCA was in turn denied by the ALJ and the Benefits Review Board on the ground that his employment did not "have the necessary 'realistically significant relationship to maritime activities involving navigation and commerce over navigable water.'" 11 B.R.B.S. 835, 839 (1980). Only the Fifth Circuit's willingness to find coverage under the amended Act for this particular injury occurring upon actual navigable waters prevented Holcomb from being denied both state and federal compensation remedies.

3. The court of appeals' denial of coverage to employees who regularly perform duties on actual navigable waters will result in substantial uncertainty and difficulty in administering the LHWCA. The "significant relationship to navigation or to commerce on navigable waters" test utilized by the Second Circuit to determine coverage is highly amorphous and elastic; indeed, the ambiguity the test creates for workers seeking compensation for injuries incurred on actual navigable waters revives a conflict between federal and state jurisdiction that this Court had laid to rest under the original Act.

Before enactment of the original LHWCA, the Court had ruled that state law could apply to "maritime" injuries over navigable waters but only if the job was a matter of purely "local" concern, *i.e.*, having no direct relationship to navigation or commerce. Compare *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922) (local law could apply), with *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142 (1928) (local law could not apply). This principle came to be known as the "maritime but local" doctrine. After enactment of the LHWCA, a dispute remained over whether Congress had intended to extend federal coverage to injuries that were compensable by the states as maritime but local concerns. After years of uncertainty for injured workers who did not know whether to pursue federal or state remedies, this Court resolved the problem in *Calbeck* v. *Travelers Insurance Co.*, *supra*. The Court held that the "maritime but local" doctrine had no effect on application of the federal statute and hence that the Act could be applied to all maritime injuries, even if those injuries were compensable under state statutes because they resulted from work not directly related to navigation and commerce. 370 U.S. at 124-127. See also *Davis* v. *Department of Labor*, 317 U.S. 249 (1942).

Calbeck and *Davis* thus established that, on actual navigable waters, federal law covered both work directly related to navigation and commerce and work that was "maritime" but did not have that direct relationship.

This Court has specifically endorsed the continuing validity of *Calbeck* and *Davis*. In *Sun Ship, Inc.* v. *Pennsylvania, supra*, the Court ruled that state workers' compensation laws could reach land-based injuries that were also now covered by the amended federal statute. The Court repeatedly relied on *Calbeck*'s holding of concurrent state and federal jurisdiction over "maritime but local" injuries in holding that state and federal jurisdiction is concurrent even over land-based injuries previously left solely to the states. The Court expressly rejected the notion that Congress intended the 1972 amendments to resurrect the "jurisdictional monstrosity that existed before the clarifying opinions in *Davis* and *Calbeck*." 447 U.S. at 720.

The decision below, however, recreates the "jurisdictional monstrosity" previously discarded. The jurisdictional linedrawing between employment on the water that is of exclusively federal concern and employment on the water that is of only local concern resurrects the uncertainty that was ultimately resolved under the original Act. Workers such as Churchill, injured on the water, cannot readily know whether to pursue state or federal remedies.

The difficulty of predicting the ultimate resolution of coverage questions under the "navigation and commerce" test is illustrated by comparing the result below with a recent Fifth Circuit decision that applied the test to uphold federal coverage for a worker performing a job virtually identical to that of the claimant here. In *Gilliam* v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir. 1981), the claimant, working

on a bridge construction project, was injured while standing on a supply barge supervising the transfer of pilings from the barge onto the shore. The court found coverage because Gilliam was unloading cargo (the pilings) from a vessel. This, the court said, was longshore work and "it follows *a fortiori* that [the] work had a realistically significant relationship to maritime activities involving navigation and commerce" (*id.* at 58).[11] The Second Circuit's contrary decision, on essentially the same facts, highlights the uncertainty now facing workers injured on actual navigable waters and demonstrates the administrative difficulties inherent in applying a flexible, ambiguous coverage test to such injuries.[12]

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[11] The Director argued below, in part, that Churchill was covered because his duties included the unloading of caissons and other material from a supply barge. Although the Second Circuit did not specifically address this issue in this case, it rejected a similar argument on rehearing in *Fusco*: "Longshoremen do not unload barges used in connection with [marine] construction." 622 F.2d at 1113. See also App. A, *infra*, 4a.

[12] The quandary facing workers injured on actual navigable waters over whether to seek state or federal remedies is further illustrated by cases from the Ninth Circuit. That court has concluded that a "pondman" sorting logs and feeding them into a lumber mill was not covered for an injury incurred while moving about on walkways and logs floating on a salt-water bay of the Pacific Ocean. *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 961-962 (9th Cir. 1976). But it has also held that a pile driver was covered for an injury incurred on a floating raft because he was constructing an off-shore dock for the unloading of oil from tankers and barges—work that was deemed "related to the traditional maritime activity of facilitating commerce on navigable waters." *Duncanson-Harrelson Co.* v. *Director, OWCP*, 644 F.2d 827, 830 (9th Cir. 1981). The Benefits Review Board has also used the "navigation and commerce" test to deny coverage to a number of workers injured on actual navigable waters who would have

The creation and maintenance of this confusion contravenes the congressional purpose behind the amendments to the LHWCA. There is no evidence to suggest that in 1972 Congress intended to exclude workers injured on actual navigable waters from coverage; on the contrary, it was clearly seeking to expand federal coverage. Review of the court of appeals' decision in this case is necessary to effectuate that legislative design.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

RICHARD G. WILKINS
Assistant to the Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
MARK C. WALTERS
Attorneys
Department of Labor

NOVEMBER 1981

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been covered prior to 1972, including a commercial diver constructing underwater sewer pipelines, *Brown* v. *Hydro-Dredge Corp.*, 13 B.R.B.S. 788 (1981), and a dredge deckhand on an airport reef runway construction project, *Ramos* v. *Universal Dredging Corp.*, 10 B.R.B.S. 368 (1979), rev'd on other grounds, 653 F.2d 1353 (9th Cir. 1981).

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1429—September Term, 1980

(Argued June 2, 1981 Decided June 17, 1981)

Docket No. 80-4250

RAYMOND CHURCHILL, PETITIONER

—*v.*—

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT & INDEMNITY COMPANY, RESPONDENTS

—and—

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR, RESPONDENT

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

Before:

MESKILL and KEARSE, *Circuit Judges*, and LASKER, *District Judge* *

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* Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

PER CURIAM:

This case presents a clear, if not easy, issue: was the claimant engaged in "maritime employment" within the "status requirement" of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (LHWCA).[1] The answer to this question depends on whether *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), has implicitly reversed the decision of this Court in *Fusco* v. *Perini North River*

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[1] Under the LHWCA, a claimant must satisfy the "status" test by demonstrating that he is an "employee," defined in § 902(3) as

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . .

The term "maritime employment" is not specifically defined in the Act. The Supreme Court recently stated that the term "refers to the nature of a worker's activities" and is "an occupational rather than a geographic concept." *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 78, 79. In *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3531 (1981), we read the *Ford* opinion "as precluding any application of the LHWCA . . . to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters."

Once a claimant has shown that he is an "employee," he must show that his injury occurred within the "situs" defined in § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Associates, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3531 (1981) (*Fusco II*). Because we believe that *Sun Ship, Inc.* has not undermined *Fusco II*, we deny the petition for review and uphold the decision of the Benefits Review Board (Board).

I.

This claim arose as a result of an injury occurring in the course of the construction of the North River Pollution Control Project, a massive undertaking described at length in *Fusco* v. *Perini North River Associates*, 601 F.2d 659, 661-62 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980) (*Fusco I*). Petitioner Raymond Churchill is a dock-builder foreman and has been a member of the dockbuilders union for more than 20 years. At the time of the accident, Churchill was responsible for the work performed on one of the "crane barges" which carried the huge "caissons" [2] to the construction site. On October 9, 1974, Churchill was injured when, in the course of supervising the unloading of a caisson, a line snapped against his leg, pitching him into the air.

On December 4, 1978, Administrative Law Judge Julius Johnson denied Churchill's claim for compensation under the LHWCA, ruling that "claimant's employment was not maritime in [the] traditional sense, but was customary construction work. . . . Mere construction over navigable water . . . does not magically convert his work . . . into maritime employment." (A. 106). On October 31, 1980, the Board affirmed,

[2] A "caisson" is a huge, hollow circular pipe used for construction in the water. *See Fusco* v. *Perini North River Associates*, 601 F.2d 659, 661 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980).

with one judge dissenting.[3] The majority held that Churchill failed to satisfy the status requirement of § 902(3), ruling that mere proximity to navigable water is not sufficient to convert the work of a construction worker into maritime commerce. Rather, the Board held, the work must have a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." (A. 113). Rejecting Churchill's argument that unloading the barge was "indisputably" a longshoring activity, the Board held that Churchill "was a construction worker whose task of unloading the [caisson] was an incidental function to his job of constructing the substructure." (A. 115). Churchill now petitions for review.

II.

Churchill advances in this Court the argument of Appeals Judge Miller in his dissent below: (i) the claim would have been covered under the LHWCA before the 1972 Amendments, see *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962); *Davis* v. *Department of Labor*, 317 U.S. 249 (1942), (ii) the 1972 Amendments were not meant to remove preexisting coverage, and (iii) *Sun Ship, Inc.* v. *Pennsylvania, supra*, proves that pre-1972 cases allowing coverage for injuries on navigable waters are still good law. The first two arguments are precisely those made in *Fusco I* and rejected in *Fusco II*. The question before us, therefore, is whether *Sun Ship, Inc.* should cause us to reformulate the standard recently adopted in *Fusco II*.

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[3] Churchill's case was decided with five other consolidated cases, all arising out of the North River Pollution Control Project.

In *Sun Ship, Inc.* the Court held that a state "may apply its workers' compensation scheme to land-based injuries that fall within the coverage" of the LHWCA. 447 U.S. at 716. After reviewing the events leading up to the enactment of the original version of the Act in 1927, the Court stated that Congress, in expanding shoreward the coverage of the Act, did not intend to diminish the sphere of permissible state compensation coverage in the "twilight zone" of coexistent state and fereral jurisdiction. Thus, the Court reaffirmed the "regime of concurrent jurisdiction" established by *Davis* v. *Department of Labor, supra,* and *Calbeck* v. *Travelers Insurance Co., supra*:

> Absent any contradicting signal from Congress, the principles of *Davis* v. *Department of Labor, supra,* and of *Calbeck* v. *Travelers Insurance Co., supra,* direct the conclusion that the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well.

Sun Ship, Inc. v. *Pennsylvania, supra,* 447 U.S. at 719-20. The Court therefore held that Pennsylvania could properly apply its state compensation system to injuries occurring in the expanded situs of the LHWCA.

Churchill now argues that the reaffirmation of *Davis* and *Calbeck* renders unnecessary any application of the "situs and status" test of *P.C. Pfeiffer Co.* v. *Ford,* 444 U.S. 69 (1980), whenever the injury occurs in the course of employment on navigable

waters. In other words, an employee engaged in construction on the water is necessarily engaged in "maritime employment" within the meaning of the Act, and no inquiry into his status is necessary. Thus, Churchill would have us apply the "situs and status" test of *Ford* where the injury occurs in the expanded contiguous zone described in § 903(a) and a simpler "situs" test where the injury occurs in the course of a job on navigable waters, as it did in *Davis* and *Calbeck*.

While the question is certainly not free from doubt, we decline to read *Sun Ship, Inc.'s* reaffirmation of *Davis* and *Calbeck* as creating such a dramatic change in the analytical framework set forth in *Ford* less than a year earlier. Indeed, Justice Brennan, writing for the Court in *Sun Ship, Inc.*, stated that "[t]he line that circumscribes the jurisdiction of the LHWCA" is a "compound of 'status' and 'situs'." 447 U.S. at 725. *Sun Ship, Inc.* held only that nothing in the 1972 Amendments precludes a state from offering compensation to an employee who is admittedly covered under the expanded situs of the Act. The distinct question of *which* employees are covered under the Act is controlled by the analysis set forth in *P.C. Pfeiffer Co.* v. *Ford*, *supra*, and applied by this Court in *Fusco II*. *See also*, *Weyerhauser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976). We do not read *Sun Ship, Inc.* as suggesting that the *Ford* analysis should not apply to injuries occurring on the water itself. We therefore adhere to our reasoning in *Fusco II*.

We have carefully reviewed the substantive contentions of Churchill and the Solicitor of Labor and have concluded that each argument is foreclosed by the decision of this Court in *Fusco II*. Since we do not feel that *Sun Ship, Inc.* has eroded the validity of *Fusco II*, the petition for review is denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of June, one thousand nine hundred and eighty-one.

Present: HON. THOMAS J. MESKILL,
HON. AMALYA L. KEARSE, Circuit Judges
HON. MORRIS E. LASKER, District Judge

80-4250

RAYMOND CHURCHILL, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT & INDEMNITY COMPANY, RESPONDENTS

and

BENEFITS REVIEW BOARD, U.S. DEPARTMENT OF LABOR, RESPONDENT

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

Filed June 17, 1981

A petition for review of an order of the Benefits Review Board,

This cause came to be heard on the record of the Benefits Review Board and was argued by counsel,

Upon consideration thereof, it is ordered, adjudged and decreed that the Petition for Review be and it hereby is denied in accordance with the opinion of this court, with costs to be taxed against the petitioner.

A. DANIEL FUSARO
Clerk

by /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

APPENDIX C

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR
Washington, D.C. 20036

BRB Nos. 79-113 & 79-113A

RAYMOND CHURCHILL, CLAIMANT-PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

BRB No. 79-116

OWEN J. QUINN, CLAIMANT

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

BRB No. 79-117

THOMAS ANDERSEN, CLAIMANT

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

BRB Nos. 79-118 & 79-118A

THOMAS KILDUFF, CLAIMANT-PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
PETITIONER

BRB No. 79-164

BERNICE ROBINSON
(Widow of MATTHEW ROBINSON),
CLAIMANT-PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-RESPONDENTS

BRB No. 79-424

PAUL CHRISTIANSEN, CLAIMANT-RESPONDENT

v.

PERINI NORTH RIVER ASSOCIATES

and

HARTFORD INSURANCE COMPANY,
EMPLOYER/CARRIER-PETITIONER

[Filed Oct. 31, 1980]

Appeals from the Decisions and Orders of
Julius Johnson and Philip Lesser,
Administrative Law Judges,
United States Department of Labor

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

SMITH, Chief Administrative Appeals Judge:

These are appeals from the Decisions and Orders of Administrative Law Judges Julius Johnson (78-LHCA-317, 78-LHCA-319, 78-LHCA-712, and 78-LHCA-721) and Philip Lesser (78-LHCA-257 and 78-LHCA-450), pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter referred to as the Act). Since each case involves common questions of law and fact, we have consolidated the cases for purposes of these appeals. 20 C.F.R. § 802.104.

All of the claimants were employed by Perini North River Associates (hereinafter, employer) and were engaged in the construction of a sewage disposal plant. The duties of the claimant in *Churchill* consisted of supervising the driving and setting of the

caissons in the river bottom, the loading and unloading of caissons from the barge, and the placement of the barge. In *Kilduff*, the claimant's duties involved driving piles into the river bed, unloading barges, and testing the weight capacity of each pile. The claimant in the *Quinn* case bailed out mud from the caissons and prepared the caissons for the pouring of concrete. In *Robinson* the claimant worked with the concrete pouring crew. The claimant in *Andersen* usually worked from caisson to caisson setting up and bolting steel beams into place; however, claimant was injured while unloading steel beams from a truck. Finally, the claimant in *Christiansen* was generally a construction worker, but for a few days including the day of the injury, he loaded a dismantled crane onto a seagoing barge.

In four of the cases, *Churchill*, *Kilduff*, *Quinn* and *Andersen*, the administrative law judge denied the claims because he found that the respective claimants did not satisfy the status requirement. In *Robinson*, the administrative law judge initially held that the claimant had met the status test but upon reconsideration reversed his earlier decision. In the sixth case, *Christiansen*, the administrative law judge held that the claimant had met the status test.

The Director has appealed the determinations of status in *Churchill*, *Kilduff*, *Quinn* and *Andersen*. In addition, the claimants in *Churchill*, *Kilduff*, and *Robinson* have appealed the denials of their claims based upon their failure to satisfy the status requirement. Employer appeals the decision in *Christiansen* that claimant satisfied the status requirement and also appeals imposition of the Section 14(e) assessment and six percent interest.

All of the claimants were engaged in the construction of the sewage disposal plant that was the sub-

ject of the Board decision in *Sedmak* v. *Perini North River Associates*, 9 BRBS 378, BRB Nos. 77-896, *et al.* (1978); *rev'd sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979); *vacated and remanded*, 100 S.Ct. 697; Board decision *aff'd*, —— F.2d ——, 12 BRBS 328 (2d Cir. June 4, 1980). In *Sedmak*, the Board held that the construction workers were neither harbor workers nor maritime employees and thus failed to meet the status test. The Board noted that the phrase "maritime employment" was not intended to include "a worker in the building or construction trades performing his usual function in the erection of any structure that *happened* to be situated upon navigable waters." *Sedmak*, *supra* at 386. Therefore, since the construction of a sewage disposal plant did not have a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters," the Board held that the claimants in *Sedmak* did not satisfy the status requirement. *Sedmak*, *supra* at 386. *Accord*, *Abrahamsen* v. *Perini North River Associates*, 9 BRBS 1041, BRB No. 78-562 (1979).

Accordingly, since the claimants in *Quinn*, *Andersen* and *Robinson* performed the same duties as the claimants in *Sedmak*, we find that the Board decision in *Sedmak* is controlling; and thus, these claimants do not meet the status requirement.[1]

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[1] In response to our colleague's dissent, we make the following points: First, we disagree with his interpretation of *P. C. Pfeiffer Co., Inc.* v. *Ford*, 100 S.Ct. 328 (1979), i.e., that the Court's construction of the status test is limited only to injuries occurring on land. The Court stated:

> The Act, as noted above, contains distinct situs and status requirements. The situs test of § 3(a) allows recovery for an injury suffered on navigable waters or certain

The claimants' in *Churchill* and *Kilduff*, in addition to their other construction duties, also loaded and unloaded barges containing caissons and other

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adjoining areas landward of the Jensen line. This test defines the broad geographic coverage of the Act. Section 2(3) *restricts* the scope of coverage by *further requiring* that the injured worker must have been engaged in 'maritime employment.' This section defines the Act's occupational requirements. The term 'maritime employment' refers to the nature of a worker's activities. [emphasis added].

Furthermore, the *Ford* Court rejected a basis of the *Fusco's* Court holding that Congress intended that all persons injured over navigable waters retain their eligibility. See *Fusco*, 10 BRBS 625, 637. The Court declined to construe "maritime employment" in Section 2(4) as creating two different situs requirements and held that the term embodies only an occupational concept.

Contrary to our colleague's contention, the *Ford* Court did not "decline" to address the question of whether the 1972 Amendments could be construed to exclude persons who would have been covered before the 1972 Amendments. Thus, the Supreme Court's vacating of *Fusco* for further consideration in light of *Ford* can only be interpreted as rejection of a purely geographic construction of the status test. The U.S. Court of Appeals for the Second Circuit on remand so interpreted *Ford*—correctly in our view.

Second, we disagree with our colleague's contention that *Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 100 S.Ct. 2432 (1980), "indicates that all injuries sustained by employees on pre-Amendment 'navigable waters' are covered after the 1972 Amendments just as these injuries were covered prior to the Amendments." The case does not explicitly or implicitly support such a contention. It holds that there is concurrent federal and state jurisdiction for *land-based* injuries. The Court's noting that the pre-1972 Act ran concurrently with state remedies in the "maritime but local" zone, does not indicate in any way that it was abandoning its construction of the status test in *P. C. Pfeiffer Co., Inc.* v. *Ford, supra*, as being only occupational and not geographic.

construction materials. This work was similar to that of claimant Sullivan in *Sedmak*, who on occasion unloaded steel from barges. The Board held that Sullivan was not engaged in "indisputably" longshoring operations. Viewing Sullivan's "overall activities," the Board concluded that "he was a construction worker whose task of unloading the steel was an incidental function to his job of constructing the sub-structure." *Sedmak, supra* at 384. The U.S. Court of Appeals for the Second Circuit denied a petition for rehearing in *Sedmak, supra*, (No. 1377-9, Aug. 19, 1980), and held that Sullivan's unloading a barge used in carrying construction materials from the shore to the point of construction was not longshoring work. Therefore, the claimants in *Churchill* and *Kilduff* also fail to satisfy the status requirement.

Lastly, we consider the claimant in *Christiansen*, who was generally a construction worker but was injured while loading a dismantled crane onto a barge. Following the Supreme Court's decision in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977), the Board has rejected the moment-of-injury test for determining an employee's status. Instead of ascertaining the maritime nature of claimant's employment based on his particular task at the moment of injury, the Board has held that status should be determined on the basis of the claimant's primary work responsibilities and overall employment. *Howard* v. *Rebel Well Service*, 11 BRBS 568, BRB No. 78-502 (1979); *Boudloche* v. *Howard Trucking Co., Inc.*, 11 BRBS 687, BRB No. 78-383 (1979). Although the claimant in *Christiansen* was injured while performing arguably "maritime employment," the facts of the case indicate that his primary work responsibilities and overall employment were not maritime

in nature. Thus, he also fails to meet the status requirement.

Accordingly, the decisions of the administrative law judges in *Churchill*, *Kilduff*, *Quinn*, *Andersen* and *Robinson* are affirmed. The decision in *Christiansen* is reversed.

SO ORDERED.

/s/ Samuel J. Smith
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

I Concur:

/s/ Ismene M. Kalaris
ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, dissenting:

I respectfully dissent from the denial of coverage for all of the claimants in these cases. The reasons underlying my disagreement with the majority are fully set forth in my dissent in *Sedmak* v. *Perini North River Associates*, 9 BRBS 378, BRB Nos. 77-896 *et al.* (1978) [hereinafter, *Sedmak*], and need not be reiterated here at length.

However, since the recent decision of the Supreme Court, *Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 100 S.Ct. 2432 (1980), requires a finding of coverage under the Act for all of the claimants herein, I will briefly review the prior case law and then discuss the dispositive holding in *Sun Ship*.

In my view, all injuries sustained in the course of employment by employees over "navigable waters," as that term was defined prior to the 1972 Amendments, are covered under the Act. In originally reversing the Board decision in *Sedmak*, the Second Circuit essentially agreed. *Fusco* v. *Perini North River Associates*, 10 BRBS 624, 601 F.2d 659 (2d Cir. 1979) [hereinafter, *Fusco*].

In *Fusco*, the Second Circuit relied on:

1) Pre-amendment cases such as *Davis* v. *Department of Labor and Industries*, 63 S.Ct. 225 (1942), which held that coverage under the Act "would have been available for a structural steel construction worker who worked over navigable waters, but whose duties were exclusively related to construction of a bridge," and *Calbeck* v. *Travelers Insurance Co.*, 82 S.Ct. 1196 (1962), which "conclusively settled that any employee, no matter what his calling, who was injured while at work on navigable waters was [in maritime employment] [brackets in

original] covered by the [Act]." 601 F.2d at 665.

2) The legislative history of the 1972 Amendments which indicated that the shoreward extension of the Act's coverage was not intended to exclude other employees traditionally covered and that "*Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility.* What concerned Congress was injuries on land." 601 F.2d at 666 (emphasis in original).

3) The remedial nature of the Act which requires a liberal interpretation to benefit employees and avoid harsh results. 601 F.2d at 667.

4) The language of the Amendments; congressional intent to avoid limiting employees injured on the water to the often low scale of state benefits; statements in the Congressional Reports; the importance of consistent interpretations which avoid confusion; the benefit to be derived from previous judicial interpretations of the phrase "employed in maritime employment;" and minimization of excessive litigation, which all mandate that the phrase "person engaged in maritime employment" be read geographically to include any person who suffers a work-related injury on navigable waters with an additional occupational element only when an injury occurs on land in an area adjoining navigable waters, *i.e.*, the extended situs covered by the 1972 Amendments. 601 F.2d at 668-69.

5) The purpose of Congress which was to extend and not withdraw eligibility. 601 F.2d at 669.

The Second Circuit concluded that the phrase "person engaged in maritime employment" must be construed geographically "so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972." [1] 601 F.2d at 669.

The Second Circuit decision in *Fusco* was consistent with *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 6 BRBS 150, 97 S.Ct. 2348 (1977) [hereinafter, *Caputo*], wherein the Supreme Court first analyzed the 1972 Amendments as they affected expanded coverage of employees injured on land, *i.e.*, the extended situs covered by the 1972 Amendments. The Court discussed the occupational aspect of the amended Act in terms of providing "continuous coverage throughout their employment to these amphibious workers who, without the 1972 Amendments, would be covered only for part of their activity." 97 S.Ct. at 2362. The Court was aware of statements in the legislative history of the Amendments which indicated congressional intent *not to exclude* employees traditionally covered. *See* 97 S.Ct. at 2358 n. 26. But since the Court was only concerned with employees injured on the land, including amphibious employees injured on the land, who, without the Amendments, would only be covered for that part of

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[1] The court did find some support for a possible exception to the purely geographic test on the water for a person whose principal duties are on land and who sustains a work-related injury on the water. 601 F.2d at 668. However, the court found it unnecessary to decide "the eligibility of a person who performed merely incidental duties on [the water]." 601 F.2d at 669 n. 17.

their activity performed on the water, "[*Caputo* did not] involve the question whether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined." 97 S.Ct. at 2358 n. 25.

In *P. C. Pfeiffer Co., Inc.* v. *Ford*, 11 BRBS 320, 100 S.Ct. 328 (1979) [hereinafter, *Ford*], the Court again addressed coverage under the Act for employees injured on the *land*. In *Ford*, as in *Caputo*, the Court noted the "remedial purposes behind the *expansion* of coverage." 100 S.Ct. at 333 (emphasis added). The Court reiterated that "maritime employment" under the amended Act was an occupational test, 100 S.Ct. at 335, but, as in *Caputo*, the Court was only faced with the issue of interpreting coverage on land since "[t]he issue in [*Ford* was] whether Ford and Bryant are the kind of *land-based* employees that Congress intended to encompass within the term 'maritime employment.'" 100 S.Ct. at 337 (emphasis added).

The Court once again took note of the Congressional Reports which accompanied the 1972 Amendments, 100 S.Ct. at 335-36 nn. 9 and 10, and, as recognized in *Caputo*, these Reports indicated congressional intent *not to exclude* other employees traditionally covered. In commenting on the pre-1972 definition of "maritime employment" which included any work performed on the navigable waters, the Court only stated that "the interpretation of the pre-1972 Act cannot obstruct Congress' obvious intent to *include* some *land-based* workers within the coverage of the current Act." 100 S.Ct. at 336 n. 11 (emphasis added).

The Court went on to hold that "Ford and Bryant were engaged in maritime employment because they

were engaged in intermediate steps of moving cargo between ship and land transportation." 100 S.Ct. at 337 (footnote omitted). In further discussing the occupational nature of the status test (as applied to employees like Ford and Bryant who were working on land), the Court noted that *rejection* of employer's contention (that coverage under the Act was limited to employees who might work on the water according to employer's assignment policies) in *Ford* served "the broader congressional purpose of *expanding* coverage." 100 S.Ct. at 338 (emphasis added).

That the Court was only concerned with the occupational nature of the status test on *land* is illustrated by the Court's own categorization of its holding as adopting "a definition of maritime employment that reaches any worker who *moves cargo between ship and land transportation.*" 100 S.Ct. at 338 (emphasis added). It is axiomatic that the Court did not intend that this definition apply to all questions of coverage under the Act since the Court recognized that " 'longshoring operations' comprise a part of the larger group of activities that make up 'maritime employment.' " 100 S.Ct. at 335 n. 7.

The Supreme Court vacated the Second Circuit decision in *Fusco* and remanded for further consideration in light of *Ford. Perini North River Associates* v. *Fusco*, 100 S.Ct. 697 (1980).

On remand, the Second Circuit realized that "the *Ford* case does not deal with construction workers and the opinion does not address itself to the question whether the 1972 amendments had the effect of depriving any class of workers of benefits which it would have enjoyed under the pre-1972 law. . . ." *Fusco* v. *Perini North River Associates*, 12 BRBS 328, 331, —— F.2d ——, —— (2d Cir. 1980). Nevertheless, the court felt that the holdings in *Ford*

defining maritime employment by reference to an occupational test based on the nature of a worker's activities rendered the earlier opinion in *Fusco* untenable. 12 BRBS at 330-31. The Second Circuit thus held that the 1972 Amendments preclude any application of the Act "to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters." 12 BRBS at 331.

Since the Supreme Court specifically limited their holding in *Ford* (as in *Caputo*) to injuries occurring on land and in both cases declined to address the question of whether the 1972 Amendments could be construed to exclude persons who would have been covered before the Amendments, I do not believe that the Supreme Court's vacation of *Fusco* for further consideration in light of *Ford* can be interpreted as a rejection of the application of the purely geographic test to work-related injuries occurring on the water.

In fact, the most recent decision of the Supreme Court involving jurisdiction under the Act, *Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 100 S.Ct. 2432 (1980) [hereinafter, *Sun Ship*], indicates that all injuries sustained by employees on pre-Amendment "navigable waters" are covered after the 1972 Amendments just as these injuries were covered prior to the Amendments.

In *Sun Ship*, decided 19 days after the Second Circuit's decision on remand in *Fusco*, the issue was whether a state could apply its workers' compensation law to land-based injuries that fall within the coverage of the Act.

The Court held that the expansion of the Act's coverage landward was concurrent with existing state workers' compensation jurisdiction. In reaching this conclusion, the Court looked to the pre-1972 case

law which had established concurrent jurisdiction for the Act and states with respect to injuries on the water.

Specifically, the Court analyzed *Davis* v. *Department of Labor and Industries*, 63 S.Ct. 225 (1942) [hereinafter, *Davis*], which held that the border between the Act's jurisdiction and state jurisdiction was a "twilight zone," and, "[w]ithin this zone, *Davis* effectively established a regime of concurrent jurisdiction." 100 S.Ct. at 2435. The Court also relied upon *Calbeck* v. *Travelers Insurance Co.*, 82 S. Ct. 1196 (1962) [hereinafter, *Calbeck*], which held that the Act covered all work-related injuries sustained on the navigable waters "without regard to whether the locus of an event was 'maritime but local,' and hence within the scope of state compensation provisions." 100 S.Ct. at 2435. The Court concluded:

> Absent any contradicting signal from Congress, the principles of *Davis* v. *Department of Labor*, *supra*, and of *Calbeck* v. *Travelers Insurance Co.*, *supra*, direct the conclusion that the 1972 extension of federal jurisdiction supplements, rather than supplants, state compensation law. *Given that the pre-1972 Longshoremen's Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well.* . . . Furthermore, the "jurisdictional dilemma," *Davis*, *supra*, . . . that results when employees must claim relief under one of two exclusive compensation schemes is as acute when the jurisdictional boundary between schemes is fixed upon land, as it is when the line is drawn between two maritime spheres. *To*

read the 1972 amendments as compelling laborers to seek relief under two mutually exclusive remedial systems would lead to the prejudicial consequences which we described in Davis as

> "defeat[ing] the purpose of the federal act, which seeks to give 'to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts . . . which aim[] at 'sure and certain relief for workmen.' "

100 S.Ct. at 2436 (emphasis added) (citations omitted).

This discussion in *Sun Ship* supports a broad interpretation of coverage under the Act since concurrent state and federal jurisdiction is favored over strict, jurisdictional boundaries. The Court was especially influenced by one of Congress' primary considerations in amending the Act which was the "paucity of relief under *state* compensation laws." 100 S. Ct. at 2438 (emphasis in original) (footnote omitted).

More importantly, *Sun Ship* is dispositive of the instant appeals since the Court found it necessary in *Sun Ship* to consider the continuing jurisdictional validity of *Davis* and *Calbeck* after the 1972 Amendments. In this regard, the Court stated:

> In particular, there is no inclination of intent to overrule *Davis* and *Calbeck*—a significant omission in light of the care which the Reports elsewhere take in identifying the Supreme Court cases to be overturned by the abolition of longshoremen's actions for unseaworthiness.

100 S.Ct. at 2437.

Sun Ship establishes that *Davis* and *Calbeck*, relied upon by the Second Circuit in the original decision in *Fusco*, are still the law. As discussed in *Fusco*, "*Davis* held that coverage under the Act would have been available for a structural steel construction worker who worked over navigable waters, but whose duties were exclusively related to construction of a bridge." 601 F.2d at 665. *See Davis*, 63 S.Ct. at 226-28. *Calbeck* conclusively settled that the Act encompassed coverage "so as to provide compensation for all injuries sustained by employees on navigable waters." 82 S.Ct. 1198 (footnote omitted).

In the decision on remand in *Fusco*, the Second Circuit recognized that "the *Ford* case does not deal with construction workers and the opinion does not address itself to the question whether the 1972 amendments had the effect of depriving any class of workers of benefits which it would have enjoyed under the pre-1972 law. . . ." 12 BRBS at 331. However, *Sun Ship*, decided by the Supreme Court 19 days after the Second Circuit's decision on remand in *Fusco*, settled the critical issues by holding that *Davis* and *Calbeck* were not overruled by the 1972 Amendments and control injuries on the water.

Under the principles of *Davis* and *Calbeck*, all of the claimants in the instant appeals are entitled to coverage under the Act since their injuries arose out of employment on pre-Amendment navigable waters.[2]

---

[2] Claimants Christiansen and Andersen are also entitled to coverage since they were engaged in loading operations at the moment of injury. For the reasons cited in my dissents in *Howard* v. *Rebel Well Service*, 11 BRBS 568, BRB No. 78-502 (1979); *Boudloche* v. *Howard Trucking Co., Inc.*, 11 BRBS 687, BRB No. 78-383 (1979); *Gilliam* v. *Wiley N. Jackson Co.*, 12 BRBS 556, BRB Nos. 79-388/A (Aug. 13, 1980); and *Miller* v. *Central Dispatch, Inc.*, — BRBS, ——,

Finally, I note that the Court's decision in *Sun Ship* was not made unmindful of *Ford* and *Caputo*. Rather, the Court was aware that

> [t]he line that circumscribes the jurisdictional compass of the [Act]—a compound of "status" and "situs"—is no less vague than its counterpart in the pre-"twilight zone" *Jensen* era. See generally *P. C. Pfeiffer Co. v. Ford*, 100 S.Ct. 328 (1979); *Northeast Marine Terminal Co.* v. *Caputo, supra;* Gilmore & Black, *supra*, at 424, 428-430; 4 A. Larson, Law of Workmen's Compensation § 89.70, at 16-283 (1979).

100 S.Ct. at 2439. That status on the water requires only an injury in the course of employment on the water is further emphasized by the discussion in *Gilmore & Black, The Law of Admiralty* (2d ed. 1975), which the Supreme Court cited in *Sun Ship*.

> The new statutory language can reasonably be read to mean that all persons who suffer employment-related injuries within the Act's expanded territorial limits are covered, provided

---

BRB Nos. 78-467/A and 79-655/A (Sept. 26, 1980), I must once again disagree with my colleagues' attempt to limit coverage under the Act by the establishment of a "de minimis" rule which bases coverage upon the amount of time spent in covered employment. "It seems clear, therefore, that when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations. . . ." *Caputo*, 97 S.Ct. at 2362 (emphasis added). Similarly, claimants Churchill and Kilduff, while not engaged in loading operations at the moment of injury, are precisely the persons covered under *Caputo* since they spent at least some of their time in indisputably longshoring operations. My colleagues ignore the rationale of *Caputo* to exclude Christiansen and Andersen and ignore *Caputo* altogether to exclude Churchill and Kilduff.

> only that they are employed by an employer "any of whose employees are employed in maritime employment [of the types specified], in whole or in part. . ." If the language is so read, and if a theory of concurrent jurisdiction is accepted for the reasons advanced in the preceding section, most maritime workers injured on or near navigable waters will be able to claim benefits under either LHCA or the relevant state compensation act.
>
> * * * * *
>
> Let us, arguendo, accept the reading of the coverage amendments suggested by the Committee Reports. Presumably any worker injured on navigable waters will continue to be covered (as he has been in the past) without any inquiry into what he was doing (or supposed to be doing) at the time of his injury. However, a worker injured on an "adjoining" land area will be covered only if he was "engaged in loading, unloading, repairing, or building a vessel."

Gilmore & Black, supra, at 429-30.

The discussion does not address any interpretation which would exclude any workers covered prior to the 1972 Amendments. *Gilmore & Black, supra*, at 428-30. This is not surprising since "[t]he legislative policy animating the [Act's] landward shift was remedial; the amendments framers acted out of solicitude for the workers." *Sun Ship*, 100 S.Ct. at 2439.

The Supreme Court recognizes that the amended Act's jurisdictional requirements on land are just as vague as the pre-"twilight zone" (pre-*Davis*) jurisditional requirements were on the water. *Sun Ship*, 100 S.Ct. at 2439. Relying on the elimination of the Act's vague pre-"twilight zone" jurisdictional re-

quirements on the water by *Davis* and *Calbeck*, the Court finds that this vagueness mandates concurrent jurisdiction on the land.

My colleagues would hold that Congress, acting out of solicitude for the workers, not only recreated pre-*Calbeck* jurisdictional confusion on the water, but also created an anachronistic pre-*Davis* jurisdictional exclusivity dilemma which compels employees to omnisciently determine whether their employment activities on the water will be deemed "maritime" by this Board.

The Court's comparison of the vague jurisdictional requirements on land to the vague jurisdictional requirements on water which existed before *Davis* and *Calbeck*, *i.e.*, their jurisdictional "counterpart in the pre-'twilight zone' *Jensen* era," *Sun Ship*, 100 S.Ct. at 2439, can only mean that no such vague jurisdictional requirements presently exist on the water.

Some jurisdictional vagueness is required on the land to exclude from the Act's coverage the majority of land-based employees who have nothing to do with maritime employment. But no such vagueness is rerequired, intended, or acceptable on the pre-Amendment navigable waters of the United States—the potential workers' compensation jurisdictional gap between state law and admiralty, the very gap which this Act in conjunction with *Davis* and *Calbeck* eliminated.

With the 1972 Amendments, the Act moved shoreward. There is no support for accompanying this one solicitous and remedial small step ashore with one 40-year giant step back into the water. I dissent.

/s/ Julius Miller
JULIUS MILLER
Administrative Appeals Judge

Dated this 31st day of October 1980

APPENDIX D

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 78-LHCA-721
OWCP No. 2-36864

IN THE MATTER OF RAYMOND CHURCHILL, CLAIMANT

v.

PERINI NORTH RIVER ASSOCIATES, EMPLOYER

and

HARTFORD INSURANCE COMPANY, CARRIER

Before: JULIUS A. JOHNSON
Administrative Law Judge

DECISION AND ORDER

This case involves a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereinafter, the "Act"). It is typical of the threshold issue of coverage under the Act raised in numerous cases involving construction of a substructure for a sewage disposal plant on the Hudson River (North River) in New York, New York. The precise question is whether claimant's duties were such as to constitute "maritime employment" within the meaning of § 902(3).

Findings of Fact and Conclusions of Law

Employer is a joint venture of construction enterprises which was awarded a contract by the city of

New York to construct a substructure for a North River pollution control project in Manhattan. This substructure was to provide the foundation for a planned sewage disposal plant. The substructure, covering roughly 30 acres, extended some 2000 feet between 135th and 145th Streets and about 700 feet from a bulkhead line near the water's edge out into the river. The construction began near the shore line and developed outward into the water. Caissons were installed by drill barges and cranes and driven into the river botton by air hammer. After the caissons were imbedded in the bedrock and pumped out, they were filled with concrete. Beams were laid horizontally from caisson to caisson and the openings between the beams were covered with pre-cast concrete panels. As the final stage, concrete was then poured over the entire area to form a deck or platform.

The caissons were delivered to the site by rail cars. With other materials, they would be placed on barges by cranes and tugs would move the barges to a point where other cranes would place them in the appropriate location for the work then underway.

Claimant, a member of a dock builder's union, was a drill barge foreman who supervised the work for the driving and setting of caissons in the river bottom. On October 9, 1974 claimant was giving directions to a crane operator in the lifting of a 20-ton caisson which was to be placed in a position for hammering. When the caisson was lifted it drew taut a line attached to the bottom of the caisson to keep it from turning while suspended by the crane. The line snapped against the back of claimant's left leg, flipping him into the air. Claimant sustained injuries to his left leg, thumb and head.

Under § 902(3) an injured worker must be a "person engaged in maritime employment, including any

longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . ."

While the Act does not define "maritime employment", it will suffice here to note that decisional authority regard it as activity having some relationship to navigation and commerce on navigable waters. See, *e.g.*, *Northeast Marine Terminal Co.* v. *Caputo*, 97 S.Ct. 2348 (1977); *Stockman* v. *John T. Clark & Son of Boston*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 97 S.Ct. 2353 (1976); *Weyerhauser Co.* v. *Gilmore*, 528 F.2d (9th Cir. 1975), *cert. denied*, 97 S.Ct. 2358 (1976); *Anderson* v. *McBoom Rig Building Service, Inc.*, 5 BRBS 714 (1977). It is determined here that claimant's employment was not maritime in this traditional sense, but was customary construction work. Indeed, it is typical of the support tasks performed for any construction project—irrespective of location. Mere construction over navigable water here does not magically convert his work, lacking even a remote connection to navigation and commerce, into maritime employment.

As a construction worker, claimant clearly does not fall within the class specifically defined as longshoremen, ship repairmen, shipbuilders or shipbreakers. Moreover, he cannot be classified as a harbor worker whose primary duties relate to the operation and care of vessels in trade or commerce within a port or harbor area. See *Anderson* v. *McBroom Rig Building Service, supra.* Recently the Benefits Review Board defined harbor workers as "those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)." *Stewart* v. *Brown & Root, Inc.*,

7 BRBS 356, 365 (1978). Even under this new definition claimant would not be regarded as a harbor worker. Despite his union identity as a dock builder at the time of injury, claimant was not building a dock, pier, wharf, or any other type of harbor facility. He was building a foundation for a sewage disposal plant which happened to extend over navigable water. To view claimant's employment otherwise would be tantamount to extending coverage to almost any worker meeting the situs requirements of § 903(a) of the Act, as the claimant here does, in virtual disregard to the nature of his duties, the enterprise of his employer, and the purpose of their particular undertaking.

It is determined that claimant was not engaged in maritime employment at the time of his injury within the meaning of § 902(3) of the Act and is therefore not entitled to benefits under the Act. It follows from the interpretation of maritime employment here that Perini North River Associates was not an "employer" within the meaning of § 902(4) of the Act.

ORDER

The claim is denied.

/s/ Julius A. Johnson
JULIUS A. JOHNSON
Administrative Law Judge

Dated: December 4, 1978
Washington, D. C.

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Joint Appendix

Office - Supreme Court, U.S.
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MAY 7 1982
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CLERK

No. 81-897

In the Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 12, 1981
CERTIORARI GRANTED FEBRUARY 22, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Page
Index of Documents Filed with Benefits Review Board..	1
Chronological List of Relevant Second Circuit Docket Entries	3
Transcript of Proceedings September 25, 1978:	
Testimony of Raymond Churchill, Direct 17-36	5
Transcript of Proceedings April 12, 1978:	
Testimony of Charles Edgar, Direct 111-122	12
Cross Examination 122	20
Order Allowing Certiorari	21

INDEX OF DOCUMENTS FILED WITH BENEFITS REVIEW BOARD

	Pages
Benefits Review Board Decision and Order affirming Administrative Law Judge's Decision and Order with Judge Miller dissenting, dated October 31, 1980	1-23
Letter from Martin Krutzel enclosing copies of Exhibit "A" to be attached to Respondent's brief, dated September 28, 1979	24
Brief for Respondents with cover letter from Martin Krutzel, dated September 27, 1979	25-51
Benefits Review Board Order granting respondents an extension to submit a response to the Petition for Review and brief, dated September 6, 1979	52-55
Letter from David MacRae Wagner stating he has no objection to extension of time, dated August 22, 1979	56
Notice of Motion for Enlargement of time, from Martin Krutzel, dated August 10, 1979	57-61
Brief of Claimant from David MacRae Wagner, dated August 7, 1979	62-68
Benefits Review Board's order denying Claimant's request for an extension of time, dated June 12, 1979	69-72
Petition for Review and brief, from Mark C. Walters, dated March 9, 1979	73-82
Letter from Laurie M. Streeter stating no motion for Reconsideration of the Decision of the Administrative Law Judges has been filed, dated February 16, 1979	83
Benefits Review Board Order acknowledging receipt of Director's Notice of Appeal and denying Director's Motion for an extension of time to file a Petition for Review and brief, dated February 9, 1979	84-89

Letter from assistant Deputy Commissioner Anthony F. Campo transmitting the case record, dated February 1, 1979 90-91

Letter from Wagner requesting 30 days from receipt of final Decision of Court of Appeals in which to file brief, dated January 23, 1979 92

Notice of Appeal, from Mark C. Walters, dated January 17, 1979 93-94

Benefits Review Board acknowledgment of claimant's Notice of Appeal and Petition for Review, dated January 18, 1979 95-96

Notice of Appeal, Petition for Review, from David M. Wagner, dated January 9, 1979 97-102

Administrative Law Judge Julius A. Johnson's Decision and Order, dated December 4, 1978 103-109

Administrative Law Judge's Materials 110-124

Original Transcript of Hearing held before Administrative Law Judges in New York, New York on September 25, 1978 .....

Respondent's Exhibit
1 (Present, but not listed in the transcript.)

RELEVANT SECOND CIRCUIT DOCKET ENTRIES

Date	Filings—Proceedings
12-12-80	Case Docketed: Petition for review of an agency order filed
12-12-80	Served copy of petition under covering letter on respondents
12-17-80	Scheduling Order #1 filed (PC 12-30-80 at 10:00 A.M.)
12-18-80	Receipt of petition under covering letter by respondents Perini & Hartford Ins. Co.
12-22-80	Receipt of petition under covering letter by respondent US Dept. Labor filed
12-23-80	David MacRae Wgner, [*sic*] Esq. form C-A filed
1-05-81	Receipt of petition under covering letter by respondent BRB filed
1-06-81	Order withdrawing petition for review subject to its reinstatement by notice to Clerk of this Court within 30 days after Supreme Court has issued its decision on the petitions for writ of certiorari in Fusco v. Perini; if not thus reinstated this matter shall be withdrawn with prejudice on consent filed [JON]
1-06-81	Issued certified copy of order withdrawing petition for review
1-07-81	Receipt of petition under covering letter by Office of the Solicitor, U.S. Dept. of Labor filed
1-13-81	Record on appeal received (original papers of BRB, U.S. Dept. of Labor)
2-25-81	Notice of appeal of reinstatement filed
3-12-81	Scheduling Order #2 filed (shall be scheduled before the same panel as 79-4085
3-12-81	Record on appeal filed (Original paper of BRB, U.S. Dept. of Labor)

Date	Filings—Proceedings
4-20-81	Petitioner Churchill brief filed (w/pfs) (by mail) Petitioner Churchill appendix filed (w/pfs) (by mail)
5-8-81	Respondent Director motion to extend time to 5-26-81 to filed brief
5-11-81	Respondent Perini North and Hartford Company brief filed (w/pfs)
5-12-81	Order granting Respondent Director motion for an extension of time to file brief filed (page proofs must be sent express mail by May 19, 1981; final briefs are duw [*sic*] on or before May 26, 1981) (endorsed on motion filed 5-8-81)
5-20-81	Respondent, Director brief filed (w/pfs) (by mail) (page proofs)
5-26-81	Respondent, Director brief filed (w/pfs) (by mail)
6-2-81	Case argued before: Meskill, Kearse, CJJ, Lasker, DJ
6-17-81	Petition denied by published per curium opinion filed
6-17-81	Judgment filed
7-8-81	Mandate Issued (judgment and opinion)
8-11-81	Record on appeal returned to district court
9-11-81	Notice from Supreme Court extending time to 11-13-81 to file petition for writ of certiorari filed
11-16-81	Claimant-Petitioner Raymond Churchill petition for writ of certiorari filed
2-25-82	Certified copy of order of Supreme Court granting petition for writ of certiorari filed (SC#81-897)

SEPTEMBER 25, 1978
TESTIMONY OF RAYMOND CHURCHILL

* * * *

[17] Q What is your job title in your present job?

A I am a dock builder foreman.

Q Are you a member of any union?

A I am a member of the Dock Builders, Shorers, Pile Drivers, Tenders and Foundation and Machine Contractor's Local Union 1456.

Q The job you are working on now, did you get that through this union?

A No, I did not, I got it on my own.

Q For how long have you been a member of this union, either in your present capacity or in any other?

A Twenty-three years, approximately.

Q When you were employed by Perini North River Associates, on or about October 9, 1974, were you at that time a member of this union?

A Yes, I was.

Q Was that job obtained through the union?

A Yes, it was.

Q Can you tell us just as briefly as you can, from the time you began your employment or association with this union, up until the time of your accident with Perini North River. Give us basically your industrial background and the type of work you performed with this union.

[26] Associates, what was your job title with them?

A Well, I was a dock builder when I first went there. We worked on driving the caissons and drilling the caissons.

And then I was up to—I got a promotion as a foreman.

Q Can you tell us the project that you were hired to work on that was being constructed by Perini?

A We were instrumental in driving the caissons, air lifting the caissons and making sockets in the caissons, which we had Texas Drills on barges, and they would drive the caissons into the rock, and then drill out an

eight foot socket into the rock, or an eight to ten foot socket in the rocks.

And, I was on a barge with the drilling machine, and that's how I got my own boat.

Q My specific question was: what was the purpose of this construction? What were you ultimately—what was Perini building there? In other words?

A They were building a facility for a sewage disposal plant.

Q Do you have of your own knowledge, do you know of your own knowledge how the sewage disposal plant would function, once it was completed?

A Well, it was—they have difference settlement [27] tanks which they pump in and it purifies the sewage. And then the solid waste is taken off by a ship, which I believe I've got the two ships names.

I believe it's the MANHATTAN and the BOWERY BAY.

They dock at the pier, which there are facilities to handle the ship at the pier, and then they take the solid waste out to sea and dump it.

Q Now, you have described the work you were doing, when you began with regard to driving the caissons, but this is not the type of work—you did not have that job title on October 9, 1974, when you were injured on the job; is that correct?

A No, I was a foreman.

Q There came a time when you received an up-grading to foreman?

A Yes.

Q Can you tell us generally what the duties of a dock builder foreman were on this particular job?

A I was to correlate all the work on the boat; to handle the caissons, the setting of the caissons; to correlate the drilling; to make sure we had the right strat rock; and to just over-see the help on the boat, because we had an awful lot of help on the boat.

Q Mr. Churchill, you have testified that you have done [28] dock building construction in your career; is that correct?

A Yes.

Q Was this essentially the same, the same type of work that was involved in dock construction anywhere?

A Yes.

Well, I mean this was a particular job like One New York Plaza before with the long caissons, but we have been instrumental in building Texas Towers and—

Q I am sorry, just for the record, in case other people are as ignorant as I, what is a "Texas Tower"?

A A Texas Tower is a platform that is used offshore, that is used for drilling oil—all we had built were three Texas Towers that was radar stations during the early 50's.

Q Now, you indicated that you supervised the work of a specific barge?

A Yes.

Q And caissons from the barge, and then drilled the caissons?

A Yes.

Q I assume that the caissons at some point were loaded onto the barge?

A The caissons came in by barge. They were loaded off a freight car at the rail siting and, they were loaded [29] onto a barge at the end of our job site, and then they were taken by tug boat, towed out and moored along side of us.

And we would use our crane to unload the caissons as we needed them from the barge, and we set them.

We would set them on site to where, you know, to where the designated area to be drilled.

Q Now, just so I have this clear, you did not carry the caissons on the barge you were working from, they were carried on the barge adjacent to the one you were working on?

A That's right, because the caissons were 100 feet long, and weighed 20 tons a piece.

Q And the equipment on the barge, that you were in charge of, was used to off load these caissons from the adjacent barge and then set them in place?

A Right, that's correct.

Q Besides this function, did you have any other duties as dock builder foreman in charge of that barge?

A Well, I kept all records, the time records and all. I did all the correlating of materials to be handled. And I correlated our—or managed our moving, which we moved our barge to different areas because our own anchors—our own barge had four set anchors out and we had four deck engines and we would move around accordingly from down pier, [30] pulled ourself down pier. We were never attached to the pier itself, only by a walk-away.

Q In other words, your barge was anchored and by adjusting the tension on the anchor ropes, you could move the barge from point to point; that was your responsibility?

A That's right, that's correct.

Q Now, with regard to the day in question, October 9, 1974, could you tell us what you were doing on that day?

A I was picking up caissons to be set—we had a frame on the side of the barge, and I was picking up this caisson.

Q Let me back up for a second. I am sorry, I am getting ahead of myself here.

On the day in question, October 9, 1974, approximately what time of day did you report to work?

A 8:00—no, 7:30, excuse me. 7:30.

Q Now, I note that the LS 203 indicates that you obtained an injury approximately 4:30 in the afternoon?

A Well, around that area.

Q Could you tell us what you were doing during the course of this day, starting when you came in and began work?

THE COURT: Well, I don't know that it's necessary to recount his entire activity that day. I think you can give him some frame of [31] reference that is near the time of the injury.

Q Were you engaged basically in this function of setting caissons throughout that day?

A Yes. Periodically we would finish a caisson and we would set—we moved by caissons also.

The barge—we would drive a caisson, and the next tier out you would move the barge out and you would drive another one. We were just in the process of moving one end of the barge and anchoring that end of the barge with the caissons, and we were picking the caisson from a different area because the boats were starting to get pretty close.

Q Excuse me.

When you say "boats are starting to get pretty close—"

A Barges, we call it boats.

Q I mean, what do you mean by "getting pretty close"? I assume they have to be close for you to lift the caissons off of?

A The work area itself, we were starting to come all together. We spread out 1200 feet down the pier and we had six boats that were driving caissons, and boats are 235 feet long.

[32] The big ones which had two cranes on each end, two cranes—excuse me—two cranes and two drill machines, and we had been bunched up in an area, which was around the out-fall pipe, which there was a little bend and the boats could not work too well.

I had to take this load of caissons in sideways, and as I was picking up the caissons, it was a new area, and I was afraid of the caisson sliding on the steel deck at the time, because steel on steel slides very fast.

Q Is this the first caisson you picked up from the particular boat or barge?

A No, that was not the first caisson I had picked up, the whole load.

We would send for 10 caissons to do a whole area, and that was out boat.

When we emptied the caissons, we would send the boat back and the tug boat would take the barge back to the area to have it refilled.

Q Was this the first caisson you were to pick up from this particular load of caissons?

A No, this was the last caisson. I had driven all the caissons on the boat, and this was the last caisson to pick up.

Q What was it that made this caisson any different [33] or the procedure to be used any different, other than the others you mentioned, steel deck—

A We always picked up the caisson head on and we would walk with them. So, when I picked up the caisson, it would be along side of you and we did not have to use the boom.

If you could—well, it's hard to describe, it's two barges along side of each other, and we pick up straight, the crane would travel and lift it into the air. So, you would have the crane perfectly level with the lift.

As you got to the end, as the caissons was a 100 feet, so you would want to move the boom anyhow.

This would have been just a straight lift, but in this circumstances, we had the barge sideways to us, and I was over here sitting by the crane, and we had to pull the caisson sideways. And, I was afraid of the 20 tons putting a slide action on the boom, which would buckle the boom balls, the 20 tons sliding through the air.

It's a just—it goes out so far and something would happen because we were limited to a small area with the crane, and I was up on the deck engine giving signals to the engineer because the engineer was working the blind side.

Q When you say, "the engineer", you are talking about [34] the individual who was running the crane?

A Yes.

Q You were giving directions from the position where you could see, but he could not?

A Yes.

He had to be stationary—

Q And pull as the caisson--

A As the caisson came through it slide sideways and I had a tag line which—

Q Excuse me.

Maybe you better tell us what a tag line is?

A A tag line is a line attached to the bottom of the caisson to keep it from turning, because as we would pick this 20 tons up, it was such a strain on the two cables, at that time the cables would unwrap—unraffle because I had a 180 foot of boom on the crane, and it was a long pick and the cable would just twist out, so you have to keep that caisson from turning.

Well, one of my workers said we have got a little leeway by this side pick but it was a little dangerous.

He took this tag line and he was supposed to be on another barge outside of me and he came behind me with a tag line and when the caisson lifted up I cleared the caisson of the deck, which was a good pick, but as my barge went, [35] the weight of the caisson went out on on this line, this tag line which was an inch and a quarter line, hit me behind the left knee, left leg and threw me in the air about 15 feet.

Q The other tag line was not being held by an individual?

A It was supposed to be tied on that barge, which I said earlier was the next barge, but this guy got a little leary of this 20 ton caisson in the air, and he came bebehind me.

Q I am sorry, I am a little bit confused.

You say he came behind you?

A The guy took the tag line from the other man and he came behind me with the tag line to take a straight pick because we did not want the caisson to slide sideways, and it was straight in front of the rig, but headed

over there and he came behind me, which I was—I had been standing on the deck engine in the bow of the boat, you know, because the crane had been stationary and the engineer could not see.

And when he came behind me, I never saw him and he never let me know that he was there, and as the load picked up and the barge went down, the caisson went out and that took the tag line, made it tight, and he had it anchored on the barge behind me on the crane—

Q Excuse me. In other words, he had moved the place [36] of anchor of the tag line from a place where you knew it to be, to a place to where you were not aware it was?

A That's right.

Q You were standing on top of a deck house, supervising the unloading of this caisson when the caisson came up and the line struck you?

A Yes.

MR. WAGNER: I have no further questions.

* * * *

APRIL 12, 1978
TESTIMONY OF CHARLES EDGAR

§[111] A In terms of dollars this was the largest non-military contract that was ever let, which was $229,000,000.

Q What specifically did this contract call upon North River Associates to carry out and to do?

A This contract required the joint venture to build a substructure to support—eventually it will be a disposal plant—which is no more than caissons or piles driven to rock, and these connected with a series of concrete beams, slabs, and more concrete to form no more than a concrete deck.

Q In other words, you had nothing to do with buildings a sewage plant for the city?

A No, Sir; we just had the substructure.

Q Is that substructure completed as yet?

A. The substructure is approximately 98 percent completed.

JUDGE LESSER: That is in the nature of the foundation for the building to go above it, is that it?

THE WITNESS: Yes, Your Honor.

BY MR. FISCHER:

Q I would like to exhibit to you Respondent's Exhibit No. 1, upon which has been marked an area where the Claimant allegedly fell. That area has been variously described, I believe, in the record, as Zone 3—

MR. EPSTEIN: Zone 2.

[112] MR. FISCHER: I am sorry; I withdraw that; it is Zone 2.

BY MR. FISCHER:

Q Would that be generally Zone 2 area from that picture?

A Yes, Sir; it would.

Q Now, from the area of the circle, part of which circle also encompasses the neck of the crane, there is a red line drawn to the right, going towards the right; is that red line going towards the shore?

A Yes, it is. That is going towards the East—the shore.

Q Underneath that circle and underneath that red line, going to the shore, I see what appears to be cement flooring or decking; is that what that represents?

A Yes, it is; that is approximately 9 inches thick, which is supported by the beam structure underneath.

Q In other words, the flooring that we are looking at in this picture, directly underneath where Mr. McDonald put his initials, is 9 inches cement flooring?

A Yes, it is.

Q When you say 9 inches, that is 9 inches thick?

A Yes, Sir.

Q Is that poured cement or is that slab cement?

A That is poured cement; poured in place.

[113] Q Now, would there be any possibility—I will withdraw that question.

I will exhibit to you 3 other photographs and as you identify them I would ask Judge Lesser to mark them in evidence and I would ask Counsel to step up so that we could do this as expeditiously as possible.

Going to the photograph, which I exhibited to you following Respondent's Exhibit 1—we will mark this particular picture Respondent's Exhibit 3, because the statement was marked Exhibit 2—

Going to Respondent's Exhibit 3, would you describe that area?

A That area is Zone 2. That right side would be towards the West side Highway of East. The left side would be out towards the middle of the river towards the Jersey Coast, to the West.

The bundles of resteel you see in that stockpile.

Q Excuse me, you will have to spell that resteel.

A R-E dash S-T-E-E-L.

It is stored for eventual use in other parts of the job. You will see the temporary bridge that the 4100 Manitowoc, or the crane, is sitting on.

The steel itself and the platforms—eventually the support for the forms for the—to hold the concrete to be poured.

[114] In the immediate background towards the George Washington Bridge would be the drill barges which are approximately a year ahead of the other work that is going on along the shore.

JUDGE LESSER: Is there any objection to receipt in evidence?

MR. EPSTEIN: No, I have no objection.

JUDGE LESSER: All right, let it be marked.

This picture, Respondent's No. 3, is looking north? Is that correct?

THE WITNESS: That is correct.

JUDGE LESSER: Then East would be to the right hand side of the picture and West to the left.

(Whereupon, the photograph referred to was marked as Respondent's Exhibit 3 and received in evidence.)

BY MR. FISCHER:

Q Would you look at this photograph, Mr. Edgar? Could you describe for us what that area represents?

A It is essentially, as the other photo, actually the Zones 2, 3, 4, and 5—they essentially looked the same. Again the photo is looking north and on the right the East is the West Side Highway or the bank and to the West is the middle of the Hudson River.

Again we have the stringers that supports the [115] forms. We have the metal forms that are stockpiled, ready to be used.

JUDGE LESSER: Any objection.

MR. EPSTEIN: No objection.

JUDGE LESSER: Let this be marked as Respondent's Exhibit No. 1.

(Whereupon, the photograph referred to was marked for identification as Respondent's Exhibit No. 4 and was received in evidence.)

BY MR. FISCHER:

Q These forms that you have described, Mr. Edgar, can you look at this Respondent's Exhibit No. 4 and describe them more in detail, so that the record will know what we are referring to when we talk about forms?

A Well, the forms are immediately in the foreground in the form of a bucket shape. The bottoms, of course, being the bottoms of the beams and will support the concrete that will be poured. The sides are the sides of the beams. These, when put together, will make up a continuous beam to support the re-bar and support the concrete and so forth.

Q Re-bar?
A Re-steel.

BY MR. FISCHER:

Q How are these forms moved, generally?
[116] A Well, they are generally made up on the shores, with the botom, or the sides connected to the bottom. They are either picked up by a cherrypicker and hauled to the construction bridge or placed on the truck and hauled to where the big cranes in the background can pick them up and swing them over to where they could be placed.

Q Are all of these an integral part of the platform upon which the sewage plant is eventually to be built?

A They form themselves on a temporary structure which is only used to form the concrete that hardens in there and is stripped and thrown away.

Q Mr. Edgar, I would now like to take you to a description of the floats that have been referred to during the course of testimony this morning.

Incidentally, were you present in the courtroom during the course of the testimony this morning?

A Yes, Sir, I was.

Q Would you tell us what those floats were?

MR. EPSTEIN: Float stages I thing they were.

BY MR. FISCHER:

Q I will concur with Counsel, the float stages which were referred to—what they consist of?

A Well, the float stages were brought on the job—we bought several hundred of these—which are the bridge deck, the temporary bridge that is shown in the pictures. [117] They form the floor to put the cranes on. We have several hundred of these and we have many hundreds of feet of bridge.

The workmen would take these bridge decking, which are made up of 12 x 12 timbers, 32 feet long, and they are bolted together 6 in a group, which makes it easy to

pick up and handle as you move the bridge—or remove the bridge—and with the surplus around, the workmen normally would pick these up if they found out that they could throw these, pick them up with a crane and place them in the river, and once they are in the river they would float. They would work off of these instead of—probably waist high normally, instead of having to stand on their heads or bend over to do the work around the caissons.

Q So these floating stages were used to complete the underpart of the superstructure?

A They were used in many different ways but, generally speaking, they were used to support forms while they changed the chokers, changed the cables I would say, so they could be hung in place and held in place until the form hangers are passed to the form supports.

Q Would it be a fair assumption to suggest that they were used in the construction of this superstructure?

A I don't understand, would you give it to me again?

Q Were they used in completing the construction of [118] the superstructure for the bulding, or the understructure?

A The main purpose, of course, was the use for the bridge platform, but they were used as a temporary support in the water, to support the forms while they were temporarily being placed or for the workmen to held support the forms.

JUDGE LESSER: Mr. Edgar, Mr. Fischer is trying to bring out that these forms, although floating, had nothing to do with any maritime use, but were rather used in connection with the construction of this structure, the substructure, is that correct?

THE WITNESS: They were only used for temporary, that is correct.

MR. FISCHER: You put it very succintly, Your Honor.

BY MR. FISCHER:

Q Mr. Edgar, when were these photographs taken, do you recollect?

A They were taken by our photographer and I am sorry, because it said the name Ostergard on the back of it, but this was taken in, as I mentioned before, about a month or a month after—along in the framework of a month before or a month after the accident.

Q How often are these photographs taken?

A We are required by the owner to take them once a [119] month.

Q And you have a running record of photographs taken once a month, from 1971 right down to date, is that correct?

A Yes, Sir.

Q Mr. Edgar, will you describe for us how the Caissons are placed?

A To begin with, a caisson is a—the ones we have are 42 inches in diameter, or 36 inch diameter, or 30 inches in diameter—made up of plate, which is either ½ inch thick or ¾ inch, and this particular job, anywhere from 60 feet long to 250 feet long.

They are picked up by one of the cranes that is working from a drill barge out in the outboard side of the structure, placed at the river botom, driven by the pile hammer until they are down to rock, at which time they are what we say, "air lifted"—the material at the river bottom, inside the caissons there. They are then drilled with a rotary drill into rock, cleaned out, inspected with a TV, at which time they are approved by the inspector and then we have placed wide flange beam end, which are designed by the engineers, whatever size they require.

Then the concrete is pumped to the bottom, forcing the water out, which gives you a complete caisson.

Q Where was the first line of caissons placed when the job was initiated?

[120] A The first line of caissons was on the bank to the east side of the structure, and to the south side

of the structure. Generally speaking, they were first placed on land by land cranes and then as we progressed riverward they were placed by the barge mounted cranes.

Q How were these caissons delivered to the jobsite?

A They were delivered from the Bethelehem Steel Company by rail, loaded on to the barge at the north end of the job and transported by—on the barge down to the zone.

Q After these caissons were placed on the river bottom, what is the next step in the construction program?

A The next step would be to place staylathe to keep the caissons in proper alignment. Staylathe is placed on the caissons to keep the caissons in alignment.

The next process would be to pour the concrete beams, which means we would install the structural steel which supports the forms. We would hang the forms, place the resteel inside the forms, and then pour the concrete.

Q When that concrete is poured, does that cover the steel beams upon which the form is hung?

A The steel beams are strictly temporary and as soon as they are poured and have gained enough strength, they are removed.

Q Now, what is the next step in the progress of [121] the construction?

A The next step would be to drop—strip the forms. Once the forms are stripped we have—these beams are approximately—the caissons themselves have a different pattern—generally about 20 or 25 foot spacing. The concrete beams are approximately 8 feet wide and 4 feet deep, which connects both east-west and north-south, connects these caissons.

When the forms are stripped we have an opening in the square between the caissons. On this we place a precast concrete slab that covers up this opening. Once the opening is covered up in a given area, resteel is then placed over the top of these precast slabs and beams and then the last stage is pour the 9 inch concrete slab.

Q And that continues until the job is completed?

A That is continued until the job is done.

Q Is there anything else you would wish to add to the construction progress of the job, other than what you have already described?

A No.

Q Do you, as far as you know, have any part in the construction of the superstructure of the sewage plant, per se?

A We have no way of knowing. To my knowledge, the superstructure will come out for bid 2 years from now and [122] it will be competitive bidding among different contractors all over the United States.

MR. FISCHER: That is all I have.

CROSS EXAMINATION

BY MR. EPSTEIN:

Q Mr. Edgar, if I recall your testimony—correct me if I am wrong, you said something about this project being the substructure for the North River Pollution Project, is that correct?

A That is correct.

JUDGE LESSER: I assume it is meant, Polution [*sic*] Control Project.

BY MR. EPSTEIN:

Q Is that North River Pollution Control Project, is that what you mean?

A That is correct.

Q By "pollustion [*sic*] control"—do you know what is meant? Do you know what the purpose of that was supposed to mean, with regard to this river?

A Yes, it is the sewage disposal plant essentially. It connects all of the sewers from the tunnels and the sewer lines, on this particular job, on the west side of Manhattan, which pulls by gravity to this structure and essentially, when the superstructure is built, it will contain tanks which will process the solids, or remove the * * *.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 22, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

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Opposition

1

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NO. 81-897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES, AND HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents.

-and-

RAYMOND CHURCHILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Director, Office of Workers' Compensation Programs, United States Department of Labor, has standing to petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, in the instant case.

2. Whether a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is a "maritime employee" within the meaning of §2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (1970 & Supp. V 1975).

TABLE OF CONTENTS

Page

Questions Presented i

Statutory Provisions Involved 2

Statement 2

Reasons for Denying the Writ 4

I. The Director, Office of Workers' Compensation Programs, United States Department of Labor, Does Not Have Standing to Petition this Court for Review of the Decision Below 4

II. The Decision Below is Consistent With the Interpretation of the Longshoremen's and Harbor Workers' Compensation Act, Mandated by This Court in *P.C. Pfeiffer Co. v. Ford* 8

III. This Court's Decision In *Sun Ship, Inc. v. Commonwealth of Pennsylvania,* Does Not Alter the Test for "Maritime Employment" Applied in the Decision Below 13

IV. The Decision Below is Consistent With the Decisions of the Circuit Courts, Which Have Considered the Issue of "Maritime Employment" Under Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act 14

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) 4
Baker v. Carr, 369 U.S. 186 (1962) 4
Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962) 11,13
Churchill v. Perini North River Associates, 652 F.2d 255 (2d Cir. 1981) 8,14
Conti v. Norfolk & W. Ry., 566 F.2d 890 (4th Cir. 1977) 15
Davis v. Department of Labor, 317 U.S. 249 (1942). 13
Director, OWCP v. Alabama By-Products Co., 560 F.2d 710 (5th Cir. 1977) 6,7
Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 5,6
Director, OWCP v. National Mines Corp., 554 F.2d 1267 (4th Cir. 1977) 6
Director, OWCP v. Peabody Coal Co., 554 F.2d 310 (7th Cir. 1977) 6,7
Flast v. Cohen, 392 U.S. 83 (1968) 4
Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), *rev'd on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) ..... *passim*
Gilliam v. Wiley M. Jackson Co., 659 F.2d 54 (5th Cir. Unit B 1981) 15,16
Holcomb v. Robert W. Kirk & Associates, Inc., 655 F.2d 589 (5th Cir. 1981) 15
Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981) 15
I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), *modified en banc on other grounds*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded sub nom. Adkins*

v. I.T.O. Corp. of Baltimore, 433 U.S. 904 (1977), *rev'd on remand,* 563 F.2d 646 (4th Cir. 1977) .. 4,6
Jacksonville Shipyards v. Perdue, 539 F.2d 533 (5th Cir. 1976) 16
Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 11,12
P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979) ..... *passim*
Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952) 12
Sea-Land Services v. Director, Office of Workers' Compensation Programs, 540 F.2d 629 (3rd Cir. 1976) 15
Stockman v. John T. Clark and Son of Boston, 539 F.2d 264 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977) 15
Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980) 13,14
United States v. Johnston, 268 U.S. 220 (1925) ... 18
Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976) . 11,12,15

Miscellaneous:

Larson, *Workmen's Compensation Law* §89.27 at 16-181 (1980) 11

Statutes:

U.S. Const., Art. III, §2 2,4,7
Federal Coal Mine Health and Safety Act, 30 U.S.C. §932(a) 7
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (1970 & Supp. V 1975) ..... *passim*

NO. 81-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.,

Respondents.

-and-

RAYMOND CHURCHILL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Perini North River Associates and Hartford Accident and Indemnity Company, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the Second Circuit in this case. The opinion of the court of appeals is reported at 652 F.2d 255.

STATUTORY PROVISIONS INVOLVED

1. Article III, §2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3) (hereinafter "LHWCA") provides in relevant part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker ***

STATEMENT

Respondent Perini North River Associates is a joint venture of construction enterprises which was awarded a contract by the City of New York to build the substructure for a sewage disposal plant. This substructure, covering roughly 30 acres, extended some 2,000 feet between West 135th and West 145th Streets in New York City, and about 700 feet from a bulkhead line near the water's edge out into the Hudson River. (Petitioner's Appendix D at 29a-30a).

The substructure was constructed by driving some 2,300 hollow circular pipes, or caissons, into the bedrock of the river by airhammer. The caissons were then filled with concrete and connected by beams. Precast concrete slabs were then placed on top of the beams, forming a platform. *Fusco v. Perini North River Associates,* 601 F.2d 659, 661 (2d Cir. 1979), *vacated and remanded,* 444 U.S. 1028, *rev'd on remand,* 622 F.2d 1111 (1980), *cert. denied,* 449 U.S. 1131 (1981).[1] Petitioner's Appendix D at 30a.

In his Decision and Order, the Hon. Julius A. Johnson, Administrative Law Judge, included the following Factual Findings:

> The caissons were delivered to the site by rail cars. With other materials, they would be placed on barges by cranes and tugs would move the barges to a point where other cranes would place them in the appropriate location for the work then underway.
>
> Claimant, a member of a dock builder's union, was a drill barge foreman who supervised the work for the driving and setting of caissons in the river bottom. On October 9, 1974 claimant was giving directions to a crane operator in the lifting of a 20-ton caisson which was to be placed in a position for hammering. When the caisson was lifted it drew taut a line attached to the bottom of the caisson to keep it from turning while suspended by the crane. The line snapped against the back of claimant's left leg, flipping him up in the air. Claimant sustained injuries to his left leg, thumb and head.

Petitioner's Appendix D at 30a.

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[1]The description employed in *Fusco, supra,* was adopted by the Court below.

REASONS FOR DENYING THE WRIT

I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, DOES NOT HAVE STANDING TO PETITION THIS COURT FOR REVIEW OF THE DECISION BELOW.

In order to properly petition this Court for review, the Director must satisfy the standing requirements of Article III, Section 2 of the United States Constitution.

> [T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has a "personal stake in the outcome of the controversy," *Baker v. Carr,* [369 U.S. 186 (1962)], at 204, and whether the dispute touches upon "the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co. v. Haworth,* [300 U.S. 227 (1937)], at 240-241.

Flast v Cohen, 392 U.S. 83, 101 (1968).

These requirements are embodied in Section 21(c) of the LHWCA, which provides in pertinent part that:

> Any person adversely affected or aggrieved by a final order of the Board may obtain review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing . . . a written petition praying that the order be modified or set aside.

33 U.S.C. § 921(c). *See ITO Corp. of Baltimore v. Benefits R. Bd., et al.,* 542 F.2d 903 (4th Cir. 1976), *vacated sub nom. Adkins v. ITO Corp. of Baltimore,* 433 U.S. 904, *rev'd on remand on other grounds,* 563 F.2d 646 (4th Cir. 1971).

> assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower and vocational rehabilitation services and assist such employees in obtaining the best such services available.

The decision below, denying coverage under the LHWCA, creates no greater administrative burdens for the Director, nor does it impair his ability to administer the Act.

While resolution of coverage issues presented in this case might permit the Director to give more certain information to potential claimants, such an interest would exist in virtually every case, and is not sufficiently particularized so as to render him an "aggrieved party" within the meaning of §21(c). "[T]he Director cannot claim to be aggrieved simply because the advice he must give is uncertain." *Donzi, supra,* at 381-82. *See also: Fusco, et al. v. Perini North River Associates, et al.,* 601 F.2d 659, 670 (2d Cir. 1979), *vacated and remanded on other grounds,* 444 U.S. 1028, *rev'd on remand,* 622 F.2d 1111, *cert. denied,* 449 U.S. 1131 (1981); *ITO Corp. of Baltimore v. Benefits R. Bd., supra* at 908 (§939(c) does "not confer upon the Director any specific interest in the proper administration of the Act" and therefore did not "provide the requisite stake.").

The Director has been found to have standing to seek review under §21(c) in certain cases. *See, e.g., Director, Office of Workers' Compensation Programs v. Peabody Coal Co.,* 554 F.2d 310 (7th Cir. 1977); *Director, Office of Workers' Compensation Programs v. National Mines Corp.,* 554 F.2d 1267 (4th Cir. 1977); *Director, Office of Workers' Compensation Programs v. Alabama By-Products Co.,* 560 F.2d 710 (5th Cir. 1977). Those cases involve claims for benefits under the Federal Coal Mine

Therefore, in order to obtain review in the Supreme Court or the Circuit Courts of Appeals, a party must be "adversely affected or aggrieved". Only the respondent Churchill was aggrieved by the decision below, and he has chosen not to petition this Court for review.

The issue of the Director's standing to seek review in cases arising out of the LHWCA has been discussed by various courts of appeals. In *Director, Office of Workers' Compensation Programs v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978), the Court held that the Director did not have standing to petition for review. The Fifth Circuit concluded that

> [c]lose analysis of each category of responsibilities exposes no interest of the Director, either pecuniary or administrative, which is adversely affected by the Board's decision in this case.

Id. at 380. The Court found the Director to have no pecuniary interest in that, under the LHWCA's compensation scheme, no government funds would be disbursed as the result of the Board's decision.

Similarly, the instant case involves no potential for governmental pecuniary liability. Any compensation payments to the claimant herein would be the sole responsibility of the employer and its insurance carrier. In the case at bar, as in *Donzi, supra,* no claim has been made which would implicate the Director's responsibilities regarding the special fund established under 33 U.S.C. § 944.

The Director's administrative responsibilities under the LHWCA are discussed in 33 U.S.C. § 939(c) which states in relevant part that

> (c) (1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation, including

Health and Safety Act, which provides through cross-reference that the compensation procedures of the LHWCA are applicable to claims against employers for black lung benefits. 30 U.S.C. §932 (a) (1976).

In *Peabody Coal, supra,* the 7th Circuit granted the Director standing, but specifically confined their holding to the "unique circumstances" of that case. *Id.* at 338. Specifically, the finding of standing was based on factors peculiar to the FCMHSA not present under the LHWCA. The most crucial of these factors were the potential for governmental liability, should the claimant prevail under the FCMHSA, and the confusion as to which provisions of the LHWCA were to be applicable to black lung cases. As stated by the 5th Circuit in *Alabama By-Products:*

> We hold only that under the unusual circumstances of this case, when an adverse determination would force the Director to expend resources to readjudicate many Black Lung claims, or when no final resolution would leave the administration of the transition phase of the program in a limbo of uncertainty, the Director's interests as administrator of the Black Lung program are sufficiently bound up with the case at bar that he must be granted standing to appear as petitioner.

560 F.2d 710, 717.

In the case at bar, unlike the Black Lung cases, the Director has no such interest, pecuniary or administrative, and therefore has no standing under Article III to petition this Court for review.

II THE DECISION BELOW IS CONSISTENT WITH THE INTERPRETATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, MANDATED BY THIS COURT IN *P.C. PFEIFFER CO. V. FORD.*

In the decision below, the Second Circuit concluded "that each argument [advanced by the petitioner and respondent Director] is foreclosed by the decision of this Court in *Fusco* II. [*Fusco v. Perini North River Assoc., et al.,* 622 F.2d 1111 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131 (hereinafter, *"Fusco II"*)]." *Churchill v. Perini North River Associates,* 651 F.2d 255, 258 (2d Cir. 1981). *Fusco II, supra,* involved the claims of two employees of respondent Perini North River Associates. The Second Circuit concluded, with regard to the "maritime employment" test of §2(3) of the LHWCA, that:

> . . . we read the opinion [of the Supreme Court in *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979)] as precluding any application of the LHWCA, as amended in 1972, to any employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

622 F.2d 1111, 1113 (1980). In reviewing the work activities of Perini North River Associates employees, the *Fusco II* Court held:

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant.

622 F.2d at 1113.

Both the decision below and that of the Second Circuit in *Fusco II* are entirely consistent with the opinion of this Court in *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979). In *Pfeiffer,* this Court rejected a geographic interpretation of the phrase "maritime employment" as "plainly inconsistent with the language and structure of the 1972 Act", holding instead that "maritime employment" embodies an occupational concept focusing upon the nature, not the location, of employment. 444 U.S. at 78.

Petitioner contends, *inter alia,* that the occupational "status" test noted in *Pfeiffer, supra,* should be restricted to injuries occurring on the shoreside areas enumerated in §3(a) of the LHWCA. Petition at 11-13. The Director argues that construction workers injured upon pre-1972 navigable waters are covered under the amended LHWCA solely by virtue of their geographic location. Petition at 7-11.

While it is correct to state that the decision in *Pfeiffer, supra,* did not deal with the claims of employees injured upon pre-1972 navigable waters, it is respectfully submitted that nothing in this Court's discussion regarding "status" under §2(3) of the LHWCA suggests that its opinion in *Pfeiffer* could be limited to shoreside areas. This Court stated explicitly that:

> Petitioner's position [urging a geographical interpretation of "maritime employment"] is plainly inconsistent with the language and structure of the 1972 Act. The Act, as noted above, contains distinct situs and status requirements. The situs test of §3(a) allows recovery for an injury suffered on navigable waters or on certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. *Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment." This section defines the Act's occupational*

> *requirements. The term "maritime employment" refers to the nature of a worker's activities.*

444 U.S. at 78. (Emphasis added).[2]

If employees injured upon navigable waters are to be covered solely by virtue of their location, two disparate tests of coverage result: an occupational test for shoreside employees and a geographic test for employees injured over pre-1972 navigable waters. This was clearly rejected by this Court in *P.C. Pfeiffer, supra:*

> The use of the term 'maritime employment' in §2(3), therefore, provides no support for the proposition that the statutory definition of an employee imports a geographic limitation narrower than the one defined in §3(a).

444 U.S. at 78.

Section 2(3) states in part, that "[w]hen used in this *Act* . . . the term employee means any person engaged in maritime employment . . . " 33 U.S.C. §902(3). (Emphasis supplied). This definition permits no license to distinguish among employees injured on any situs noted in §3(a). "To be eligible for compensation, a person must be an employee as defined by §2(3) who sustains injury on the situs defined by §3(a)." *Pfeiffer,* 444 U.S. at 74. Congress intended to apply a simple, uniform standard of coverage. *Id.* at 83.

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[2]It is clear from the above-cited language that this Court did not simply emphasize "that the phrase 'maritime employment', as used in Section 2(3), has an occupational content and does not focus exclusively on the locus of a person's workday activities." Petition at 12. Rather, this Court explicitly stated, no less than three times, that situs and status are separate concepts and that status refers to occupation, not location.

In addition, contrary to petitioner's assertions, coverage under the 1927 Act provides no basis for coverage under the Act as amended in 1972. By affirmatively describing the classes of workers contained in the §2(3) definition of "employee", Congress has indeed withdrawn coverage from those individuals, such as construction workers, who otherwise might have been covered under the 1927 Act solely by virtue of the situs of injury. *See Pfeiffer, supra* at 78.

Assuming, *arguendo*, that respondent Churchill would have been covered under the 1927 Act, he must now satisfy the "maritime employment" test of §2(3)—a prerequisite to coverage not previously demanded of the particular claimant. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264 (1977).[3]

In *Weyerhauser Co. v. Gilmore,* 528 F. 2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976), the court termed the assertion that anyone covered under the Act prior to the 1972 Amendments must indeed be permitted to come within its protection subsequent to the Amendments, "an exercise in judicial legerdemain". 528 F.2d at 960-61.

To the extent that construction workers were covered prior to 1972, such coverage was due to the strict situs rule announced by this Court in *Calbeck v. Travelers Insurance Company,* 370 U.S. 114 (1962). Clearly, construc-

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[3]Professor Larson, in his treatise on Workers' Compensation Law stated,

> . . . that the expansion of the Act took place *solely* in the enlargement of "situs" covered. The addition of the "status" test is not an expansion but a contraction.

4 LARSON, *WORKMEN'S COMPENSATION LAW,* §89.27 AT 16-181 (1980).

tion workers employed over pre-1972 navigable waters were never themselves considered to be in "maritime employment". In *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1952), this Court flatly stated that not all persons covered under the 1927 Act were engaged in "maritime employment".

> If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime'.

344 U.S. at 341-42.

Of particular importance is the collection of cases made by the Court which "deal with various types of construction and service workers, *obviously not themselves engaged in traditional 'maritime employment',* if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341. (Emphasis added).

"Maritime employment" as used in §2(3) of the Act requires a single, uniform, occupational test, regardless of where the claimant is employed within the §3(a) situs. *Caputo, supra,* 432 U.S. 249, 272.

This Court stated in *P.C. Pfeiffer, supra,* "[w]e decline the invitation to construe 'maritime employment' so as to create two differing situs requirements in a single sentence." 444 U.S. at 79. To hold that any employment over 1927 navigable waters is a sufficient basis for coverage would be to read § 2(3) out of the Act. *Id.* at 79; *Weyerhauser Co. v. Gilmore, supra,* 528 F. 2d at 961. Such legislative revision is most appropriately left to Congress.

III. THIS COURT'S DECISION IN *SUN SHIP, INC. V. COMMONWEALTH OF PENNSYLVANIA*, DOES NOT ALTER THE TEST FOR "MARITIME EMPLOYMENT" APPLIED IN THE DECISION BELOW.

The Second Circuit explicitly rejected petitioner's argument that this Court's decision in *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980), implicitly overruled *Fusco v. Perini North River Associates,* 622 F.2d 1111 (2d Cir. 1980), which applied an occupational status test to injuries occuring over pre-1972 navigable waters. The court below concluded: "We do not read *Sun Ship, Inc.* as suggesting that the *Ford* analysis should not apply to injuries occuring on the water itself." 652 F.2d 255, 258.

There is no language in *Sun Ship, Inc., supra,* which even remotely suggests that the occupational "status" requirement can be limited to injuries occuring on the shoreside areas described in §3(a) of the LHWCA. *Sun Ship, Inc.* dealt solely with the issue of whether state compensation remedies could apply within these areas. Nor can this Court's discussion of the prior decisions in *Calbeck v. Travelers Ins. Co.,* 370 U.S. 114 (1962) and *Davis v. Department of Labor,* 317 U.S. 249 (1942) be construed as anything more than a recognition that a zone of concurrent jurisdiction, announced in those cases, continues to exist with respect to certain claims under the LHWCA.

Absent a repeal of §2(3) of the LHWCA, *Sun Ship, Inc.* does not, and could not, reaffirm that portion of *Calbeck* which permits federal jurisdiction over claims for injuries occurring upon pre-1972 navigable waters without an inquiry into the injured employee's occupation. As noted in the decision below,

> *Sun Ship, Inc.* held only that nothing in the 1972 Amendments precludes a state from offering compensation to an employee who is admittedly covered under the expanded situs of the Act. The distinct question of *which* employees are covered under the Act is controlled by the analysis set forth in *P.C. Pfeiffer v. Ford, supra,* and applied by this Court in *Fusco II.*

652 F.2d at 258.

Thus, the issue of concurrent jurisdiction can be reached only after it is determined that jurisdiction under the LHWCA exists. Certainly there is nothing in *Sun Ship, Inc.* or in any other decision rendered under the LHWCA to suggest that §2(3) can be interpreted differently depending on where the employee is injured.[4] In fact, this Court in *Sun Ship, Inc.* reaffirmed the status test as "the line that circumscribes the jurisdictional compass of the LHWCA." 447 U.S. at 725. There is no indication that this line changes at the water's edge.

IV. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE CIRCUIT COURTS WHICH HAVE CONSIDERED THE ISSUE OF "MARITIME EMPLOYMENT" UNDER SECTION 2(3) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

In its decision below, the Second Circuit adhered to the standard for "maritime employment" announced in *Fusco II,* namely work that "bear[s] a significant relationship to navigation or to commerce on navigable waters." *Churchill v. Perini North River Assoc., et al.,* 652 F.2d 255, n.1, 256 (2d Cir. 1981). The test employed by the

[4]See discussion at 9-10, *supra.*

court below is consistent with that adopted by every Circuit which has considered the issue of maritime employment under §2(3) of the LHWCA. *See Stockman v. John T. Clark and Son of Boston,* 539 F.2d 264, 271, 276 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *Fusco, et al. v. Perini North River Associates, et al.,* 622 F.2d 1111, 1113 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131 (1981); *Sea-Land Serv. v. Director, Office of Wkrs.' Comp. Programs,* 540 F.2d 629 (3rd Cir. 1976); *Conti v. Norfolk & Western Railway Co.,* 566 F.2d 890 (4th Cir. 1977); *Gilliam v. Wiley M. Jackson Co.,* 659 F.2d 54, 56 (5th Cir. Unit B 1981); *Hullinghorst Industries, Inc. v. Carroll,* 650 F.2d 750, 754, 756 (5th Cir. 1981); *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976).

Petitioner Director and respondent Churchill cite the recent decision of the Court of Appeals for the Fifth Circuit in *Holcomb v. Robert W. Kirk & Associates, Inc.,* 655 F.2d 589 (5th Cir. 1981) as an example of a conflict among the circuits. The Fifth Circuit did *not* base it's decision upon the fact that the claimant in *Holcomb* was injured upon pre-1972 navigable waters.[5] Rather, the court found

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[5] Respondent Churchill states that the Fifth Circuit, quoting *Fusco I,* held:

> Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility.

Respondent's Brief in Support at 3, *citing* 655 F.2d 589, 593.

Respondent Churchill goes on to allege that the *Holcomb* Court held that the pre-existing coverage provisions *"were not withdrawn by the 1972 amendment."* Respondent's Brief in Support at 3, *citing* 655 F.2d at 592.

As discussed above, this is a patent misreading of the *Holcomb* case. Although the court cited pre-amendment case law, it did perform the required occupational analysis, premising status upon its

(Footnote continued on following page)

that the claimant's "work was certainly an 'integral part' of and 'directly involved in an ongoing ship repair operation.' " 655 F.2d at 594, citing *Jacksonville Shipyards v. Perdue,* 539 F.2d 533, 544 (5th Cir. 1976). In fact, the Fifth Circuit cautioned that all employees injured upon pre-1972 navigable waters were *not* covered under the LHWCA: "We do not hold that every watchman of a vessel in navigable waters comes under the Longshoremen's Act." 655 F.2d at 594.

Petitioner Director also cites the decision in *Gilliam v. Wiley M. Jackson Co.,* 659 F.2d 54 (5th Cir. Unit B 1981) as an example of a conflict among the circuits. In *Gilliam,* the employer was engaged in the construction of two parallel high-rise bridges over the Amelia River.

The employer had contracted with a supplier to have pilings for the eventual construction shipped by barge some 110 miles to the job site. Upon their arrival, the pilings were off-loaded to a storage point on the shore. Claimant was injured while unloading pilings from a barge to a storage area for later use in the construction process.

In holding that the claimant in *Gilliam* met the "status" test of §2(3), the Fifth Circuit affirmed the use of the "realistically significant relationship" test employed by the Second Circuit in the decision below. 659 F.2d at 56. After analyzing his activities at the moment of injury, the Court found that Gilliam was engaged in "maritime employment". 659 F.2d at 58.

(Footnote continued from preceding page)

holding that the claimant's work was an "integral part" of and "directly involved in an ongoing ship repair operation." 655 F.2d at 594. The court noted that both "status" and "situs" were necessary for coverage under the LHWCA, 655 F.2d at 591, 594, and rejected the geographic analysis of status proposed in *Fusco I,* by noting that not all injuries incurred on navigable waters come within the Act. 655 F.2d at 594.

In the instant case, caissons used in the construction of the substructure traveled by rail to a storage point near the job site. As needed, the caissons were placed onto barges which served as floating work platforms, and were then driven into the river bed by construction workers. Churchill was injured while preparing a caisson to be set into a river bed.

The mere act of lifting materials in the course of construction does not transform a construction worker into a longshoreman. In *Fusco II, supra,* on a Petition for Rehearing, claimant Sullivan alleged that he too was engaged in longshoring operations by virtue of the fact that he would unload barges containing construction materials. In denying the Petition, the Second Circuit stated that,

> . . . our conclusion that Sullivan was not engaged in longshoring operations was correct. The evidence shows that his duties were exclusively in connection with the construction of a sewage disposal plant. When Sullivan unloaded a barge used in carrying construction materials from the shore to the point of construction, he was not performing operations which longshoremen perform. Longshoremen do not unload barges used in connection with construction of a structure which reaches from a point on shore to a point in the river.

622 F.2d 1111, 1113 (2d Cir. 1980).

P.C. Pfeiffer, supra, mandates an inquiry into the factual circumstances surrounding the individual employee's work activity. 444 U.S. at 78. Since the Circuits have adopted a legal standard requiring a nexus between a claimant's work and maritime activities involving navigation and commerce on navigable waters, it is clear that the alleged "conflicts" with the decision below refer simply to differing results dependent upon the particular

factual circumstances of each case. It is respectfully submitted that the decision from which review is sought herein turns solely upon questions of fact, and is thus not a proper subject for review by this Court. *United States v. Johnston,* 268 U.S. 220, 227 (1925).

The court below correctly applied an occupational "status" test as mandated by this Court in *Pfeiffer, supra,* the substance of which is consistent with that applied by every circuit which has considered the issue.

CONCLUSION

FOR THESE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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No. 81-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES, *et al.*

Respondent.

BRIEF OF RESPONDENT, RAYMOND CHURCHILL, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
I. QUESTION PRESENTED	1
II. STATEMENT	1
III. ARGUMENT	2
1. The Court Of Appeals For The Second Circuit Has Decided The Question Presented In Direct Conflict With The Decisions Of The Fifth Circuit.	2
2. The Second Circuit Decision From Which Review Is Sought Was Decided In Apparent Conflict With Prior Decisions Of This Court.	3
3. Congress Intended To Extend, Not Limit, Coverage Under The 1972 Amendment To The LHWCA.	4
IV. CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	Page
Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2nd 368 (1962)	3, 4
Davis v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942)	3, 4
Fusco v. *Perini North River Associates*, 601 F.2d 659 (2nd Circuit 1979) (Fusco I)	2, 3
Fusco v. *Perini North River Associates*, 622 F.2d 1111 (2nd Circuit 1979) (Fusco II)	2, 3
Holcomb v. *Robert W. Kirk & Associates*, 655 F.2d 589 (5th Circuit 1981)	3
Northeast Marine Terminal Company v. *Caputo*, 432 U.S. 249, 53 L.Ed. 2nd 320, 97 S.Ct. 2348 (1977)	4
Pfeiffer v. *Ford*, 444 U.S. 69, 62 L.Ed. 225, 100 S.Ct. 328 (1979)	2
Sun Ship, Inc. v. *Commonwealth of Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2nd 458 (1980)	4
MISCELLANEOUS:	
S. Report #92-1125, 92nd Cong.; 2d Sess. (1972)	4

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Respondent.

BRIEF OF RESPONDENT, RAYMOND CHURCHILL, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. QUESTION PRESENTED

Does the 1972 amendment of the Longshoremen & Harborworker's Compensation Act, 33 U.S.C. 902 (3) withdraw coverage from employees formerly within the purview of this Act?

II. STATEMENT

(Numbers in parentheses refer to pages in appendix to Petition for Writ of Certiorari)

Respondent, RAYMOND CHURCHILL, was a dockbuilder foreman in charge of a "crane barge" involved in the unloading of caissons at the site of construction of the North River Pollution Control Project undertaken by respondent-employer, PERINI

NORTH RIVER ASSOCIATES. On October 9, 1974, while on such barge moored in the navigable waters of the North River, CHURCHILL was injured when, in the course of supervising the unloading of a caisson, a line snapped against his leg throwing him into the air and causing the injuries which resulted in this proceeding (3a). The administrative proceedings leading to the Circuit Court's decision from which certiorari is sought are set forth in detail in the petition and will not here be repeated.

III. ARGUMENT

1. The Court Of Appeals For The Second Circuit Has Decided The Question Presented In Direct Conflict With The Decisions Of The Fifth Circuit.

The Second Circuit Court of Appeals first had occasion to consider the effect of the 1972 amendment to the Longshoremen & Harborworker's Act in the case of *Fusco* v. *Perini North River Associates*, 601 F. 2nd 659, (2nd Circ. 1979) (hereinafter *Fusco I* in view of the subsequent decision of the same Court in the same case on remand, differentiated as *Fusco II*). The Court there held that the two petitioners were covered because their injuries occurred while working on fixed structures attached to land. Fusco, descending a swing ladder from a concrete form to a raft was thrown against the form causing him to fall; Sullivan was installing beams while standing approximately 12'' above the water. The Court defines the phrase " 'person engaged in maritime employment' geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972" (P. 669). Upon appeal to this Court the matter was remanded for further consideration in light of this Court's decision in *Pfeiffer* v. *Ford*, 444 U.S. 69, 62 L.Ed 225; 100 S.Ct. 328. In its subsequent decision on remand, 622 F. 2nd 1111 (2nd Circuit 1979) (*Fusco II*), the Second Circuit did a complete turnabout, holding that the term "harborworker" had no reference to the locus of employment but referred solely to the work activity performed (P.1113). That this holding excludes those employees who were covered prior to the 1972 amendment is reinforced by the decision here under review, wherein the Court specifically states "Churchill advances in this Court the argument [that] * * * the claim

would have been covered under the LHWCA before the 1972 amendments [and] the 1972 amendments were not meant to remove pre-existing coverage * * * (citations omitted). [These] * * * arguments are precisely those made in *Fusco I* and refuted in *Fusco II*." Thus, the Second Circuit drove the final nail into the coffin of preamendment coverage.

The nation's other major maritime jurisdiction, the Fifth Circuit, has, however, taken a diametrically opposite position. In *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, 655 F.2nd 589 (5th Circ. 1981), the Court, quoting *Fusco I*, held " 'Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility'." (P.593) The Fifth Circuit specifically held that the pre-existing coverage provisions "*were not withdrawn by the 1972 amendment.*" (Emphasis supplied) (P. 592). This Court should grant review to resolve this conflict between the two major maritime circuits of this nation.

2. The Second Circuit Decision From Which Review Is Sought Was Decided In Apparent Conflict With Prior Decisions Of This Court.

Prior to the 1972 amendment to the LHWCA a jurisdictional maze of conflicting remedies compelled an injured worker to run the risk of unnecessary expense and possible foreclosure by selection of an inappropriate jurisdiction. *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942) partly solved this problem by establishing a zone in which concurrent Federal and State jurisdiction existed. Continued litigation over coverage caused this Court to lay to rest the jurisdictional confusion existing prior to 1972 in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2nd 368 (1962) which definitively stated that the LHWCA "reached all those cases of injury to employees on navigable waters * * * whether or not a particular one was also within the Constitutional reach of a State Worker's Compensation Law" (pp. 126-127). The simple clarity of these words endured for a mere decade; the 1972 amendment recreated the same jurisdictional maze which this Court had hoped to lay at rest with *Davis* and *Calbeck*. The inferno of post-amendment

litigation was fueled by the belief that the 1972 amendment had legislatively overruled *Calbeck* and *Davis*. This furor was not calmed by this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 53 L.Ed. 2nd 320, 97 S.Ct. 2348 (1977) which specifically left unaddressed the question (P.265) "Whether Congress excluded people who would have been covered before the 1972 amendment; that is, workers who were injured on navigable waters as previously defined."

All controversy concerning the continued vitality of *Davis* and *Calbeck* should have been laid to rest by this Court's decision in *Sun Ship, Inc.* v. *Commonwealth of Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed. 2nd 458 (1980) which specifically quoted both of those cases as valid and applicable law. Patently, as *Calbeck's* holding of coverage for all injuries over navigable waters is still valid law, the Second Circuit's conclusion rejecting claimant's arguments based on *Calbeck* and *Davis* is clearly erroneous.

3. Congress Intended To Extend, Not Limit, Coverage Under The 1972 Amendment To The LHWCA.

The 1972 amendment to the Act was concerned only with employees injured on land who, prior thereto, would only be covered for that part of their activity performed on the water, *Northeast Marine Terminal* v. *Caputo, supra*. That this remedial legislation was intended to expand coverage is further clear from the legislative history of the Act reported at pp. 12-13 in Senate Report #92-1125, 92nd Congress, 2nd Session (1972) stating that the amendment "specifically includes any longshoremen or other person engaged in longshoring operations and any harborworker including a ship repairman, shipbuilder and ship breaker. *It does not exclude other employees traditionally covered* * * *. (Emphasis supplied). This liberal interpretation of the amendment has been confirmed by this Court in both *Caputo* and *Sun Ship, supra*. It clearly defies common sense and reason to believe that the framers of an Act unanimously considered remedial would have intentionally excluded many of those covered for purposes of jurisdictional certainty.

IV. CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-897

In the Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases: Page

Boudreaux v. *American Workover, Inc.*, 664 F.2d 463, rehearing en banc granted (Jan. 11, 1982).. 9
Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114.... 6, 7
Davis v. *Department of Labor*, 317 U.S. 249 7
Director v. *Alabama By-Products Corp.*, 560 F.2d 710 3
Director v. *Donzi Marine, Inc.*, 586 F.2d 377 2
Director v. *Eastern Coal Corp.*, 561 F.2d 632 3
Director v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904, vacating and remanding *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, aff'd on remand, 575 F.2d 79, cert. denied, 440 U.S. 967.... 3
Director v. *National Mines Corp.*, 554 F.2d 1267.... 3
Director v. *Peabody Coal Co.*, 554 F.2d 310 3
Director v. *Rasmussen*, 436 U.S. 955 3
Director v. *Walter Tantzen, Inc.*, 446 U.S. 905, vacating and remanding *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670, rev'd on remand, 624 F.2d 5 4
Fusco v. *Perini North River Associates*, 622 F.2d 1111, cert. denied, 449 U.S. 1131 ..... 7, 9
Gilliam v. *Wiley N. Jackson Co.*, 659 F.2d 54, petition for cert. pending, No. 81-1039 ..... 8, 9
Holcomb v. *Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, petition for cert. pending, No. 81-1109.. 9
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 5
Nogueira v. *New York, N.H. & H.R. Co.*, 32 F.2d 179, aff'd, 281 U.S. 128 5
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... 2, 3, 8
P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 .....7, 8, 10
Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 ..... 5, 6
Pippen v. *Shell Oil Co.*, 661 F.2d 378 10
Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 7

Statutes and regulations: Page

Black Lung Benefits Act of 1972, 30 U.S.C. (& Supp. III) 901 *et seq.* 3

30 U.S.C. 925(a)(4) 3
30 U.S.C. 925(a)(5) 3
30 U.S.C. 932(a) 3

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.*:

33 U.S.C. 902(3) 4, 9
33 U.S.C. 902(4) 5
33 U.S.C. 903(a) 8
33 U.S.C. 921(c) 2
33 U.S.C. 939 2

28 U.S.C. 1254(1) 2
20 C.F.R.:

Section 701.201 2
Section 802.410(b) 2

Miscellaneous:

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 4

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REPLY BRIEF FOR THE PETITIONER

Respondents Perini North River Associates and Hartford Accident and Indemnity Company (hereinafter jointly referred to as "Perini") urge the Court to deny the Director's petition on the basis of a procedural objection to further review and several substantive arguments. The procedural objection, however, has no application to Supreme Court review of a court of appeals decision, and the main thrust of Perini's substantive arguments—that the decision below does not conflict in its reasoning or result with decisions of this Court or other circuits—is erroneous.

1. Perini first contends (Br. in Opp. 4-7) that the Director lacks "standing" to petition for a writ of certiorari in this case. As sole support for this proposition, Perini cites Section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 921(c), which provides that an appeal may be taken to a court of appeals by "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board." Section 21(c), however, plainly applies only to review in the courts of appeals. Review in this Court is governed by 28 U.S.C. 1254(1), which permits "any party" to a civil or criminal case to petition for a writ of certiorari. As federal respondent to the claimant's petition from the order of the Benefits Review Board, the Director was indisputably a party in the court of appeals [1] and is therefore entitled by statute to petition for review in this Court.[2]

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[1] The LHWCA directs the Secretary of Labor to administer its provisions. 33 U.S.C. 939. The Secretary has designated the Director to administer the Act's enforcement (20 C.F.R. 701.201) and to serve as "the proper party on behalf of the Secretary of Labor in all review proceedings" in the courts of appeals (20 C.F.R. 802.410(b)).

Claimant Churchill, as respondent in this Court, has filed a brief in support of the Director's petition.

[2] The case on which Perini primarily relies to support its standing argument (Br. in Opp. 5) is inapposite because it concerns resort to the court of appeals. *Director* v. *Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978). Although *Donzi Marine* held that the *Director* is not "adversely affected or aggrieved" for the purpose of obtaining court of appeals review under 33 U.S.C. 921(c), the case clearly has no application to Supreme Court review where the *claimant* sought review in the court of appeals and the Director participated before that court as a party respondent. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977).

This Court has repeatedly recognized the Director's capacity to petition for certiorari.[3] Ten days after discussing the propriety of the Director's participation in the court of appeals before his formal designation as the proper federal party (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977)), this Court granted a certiorari petition filed by the Director without the participation of the claimant. *Director* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), vacating and remanding *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976), aff'd on remand, 575 F.2d 79 (1978), cert. denied, 440 U.S. 967 (1979). A year later, the Court again considered a petition for certiorari filed by the Director, this time in a case in which the Director challenged the result reached by the Board and affirmed by the court of appeals. *Director* v. *Rasmussen*, 436 U.S. 955 (1978). The Court granted the Director's petition, as well as the petition of the employer and insurer, without ex-

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[3] The Director, furthermore, believes he is entitled to petition for court of appeals' review of an adverse Board decision. As Perini concedes (Br. in Opp. 6), several courts of appeals have recognized the Director's standing to seek review of an unfavorable Board decision in the context of the Black Lung Benefits Act of 1972, 30 U.S.C. (& Supp. III) 901 *et seq.*, which incorporates the judicial review provisions of the LHWCA. See 30 U.S.C. 925(a)(4) and (5); 30 U.S.C. 932(a); *Director* v. *Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977); *Director* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977); *Director* v. *Alabama By-Products Corp.*, 560 F.2d 710 (5th Cir. 1977); *Director* v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977). The question whether the Director may obtain court of appeals' review of Board decisions under the LHWCA ultimately may require this Court's attention. That question, however, is not presented here.

pressing any doubts about the propriety of the Director's status in the case, even though the government's petition (77-1465 Pet. 2 n.1) directed the Court's attention to the issue. Finally, in 1980, the Court granted another petition filed solely by the Director, despite the respondent's objection that the Director lacked standing to seek review of an adverse court of appeals' decision in a coverage case. *Director* v. *Walter Tantzen, Inc.*, 446 U.S. 905 (1980), vacating and remanding *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), rev'd on remand, 624 F.2d 5 (1980).

There is, therefore, no serious question about the Director's standing to petition for a writ of certiorari in cases where he participated as a party before the court of appeals. As the federal official responsible for the proper administration of the LHWCA, the Director must be able to seek review of courts of appeals decisions that, in his view, misconstrue the Act.

2. The most significant aspect of Perini's argument on the merits is its failure to challenge the Director's principal contention—that the decision below conflicts with Congress' intent, in enacting the 1972 amendments, to *expand* coverage under the Act "to protect *additional* workers" (S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added)) (see Pet. 8-9). Perini does not discuss the legislative history of the 1972 amendments or explain how its construction of the Act is consistent with Congress' expressed purpose. Rather, Perini appears to contend (Br. in Opp. 11) that, by adding the "maritime employment" test in Section 2(3), 33 U.S.C. 902(3), Congress inadvertently withdrew coverage from some workers. We submit that "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so

expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

In addition, the arguments that Perini does present do not justify the court of appeals' result.

a. Relying on *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334 (1953), and cases cited therein, Perini incorrectly argues (Br. in Opp. 11-12) that "construction workers employed over pre-1972 navigable waters were never themselves considered to be in 'maritime employment.'" On the contrary, however, *O'Rourke* and other pre-1972 cases make clear that workers injured on actual navigable water were "maritime employees" even when their jobs were the type normally performed on land. The performance of work *on the water* rendered their jobs "maritime" and thus fulfilled the "maritime employment" requirement that was then contained only in the definition of "employer" and is now also contained in the definition of "employee." See Pet. 7 n.6.[4]

In *O'Rourke*, the Court specifically noted that " 'the mere locus of the accident [in the course of employment] necessarily determines the right' " to coverage. 344 U.S. at 340, quoting from *Nogueira* v. *New York, N.H. & H.R. Co.*, 32 F.2d 179, 182 (2d Cir. 1929), aff'd, 281 U.S. 128 (1930) As the dissent in *O'Rourke* explained, there was "but one question" in the case,—*i.e.*, "whether this [claimant] was engaged in 'maritime employment' at the time of his injury." 344 U.S. at 342. The claimant, a railroad brakeman

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[4] In *O'Rourke*, for example, only workers engaged in the car float operation, like the injured brakeman, could have met the coverage requirement of 33 U.S.C. 902(4) that an employer have at least one employee engaged in "maritime employment."

engaged in removing freight cars from a car float, was implicitly held to be in "maritime employment" although his work was a railroad job normally performed on land. As the dissent noted (344 U.S. at 343), the "place is the only thing that differentiates" the job of a brakeman on land from that of a brakeman removing freight from a car float on water. The Court nevertheless reasoned that the mere locus of the brakeman's injury made his employment "maritime" (*id.* at 340).[5]

The overriding importance given to the geographical locus of an injury was at the heart of the "maritime but local" doctrine under the pre-1972 Act. See Pet. 14. A job performed on the water was always "maritime"; it was either maritime but local, so that state law could apply, or maritime and national, subject to exclusive federal jurisdiction. A maritime job was deemed "local" in nature if it had no direct relationship to navigation and commerce. See *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962). Thus, prior to 1972, a job clearly did not need to be directly related to navigation and commerce to be maritime. The error of the court of appeals was in construing "maritime" under the amended Act

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[5] The Court noted that the brakeman in *O'Rourke* would be a covered maritime employee whether he had been injured while loading freight cars onto or off of a float: "Both employments are maritime" (344 U.S. at 340).

The statements in *O'Rourke* relied upon by Perini (Br. in Opp. 12), merely explain that coverage under the pre-1972 Act was not dependent upon the inherent nature of a claimant's assigned task, which might involve typical land-based skills such as painting, carpentry, or construction work (344 U.S. at 341 n.7). Regardless of the lack of traditional maritime skills, if a job was performed on the water prior to 1972, it was "maritime" for purposes of the Act (*id.* at 340).

as requiring a direct relationship to navigation and commerce not required before the amendments, and thereby denying coverage to someone who unquestionably would have been covered before 1972.

b. Contrary to Perini's assertions, the decision in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), does not mandate the result below. To support its position that the amended Act excludes some workers injured on actual navigable waters, Perini relies (Br. in Opp. 8) not on *Ford* itself but on the Second Circuit's analysis in *Fusco* v. *Perini North River Associates*, 622 F.2d 1111, 1113 (1980), cert. denied, 449 U.S. 1131 (1981), where the court said:

> [W]e read the opinion [in *Ford*] as precluding any application of the LHWCA, as amended in 1972, to any employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

Ford, however, does not mention the "navigation and commerce" test, and therefore provides no support for the Second Circuit's application of such a test. *Ford*, moreover, cannot be read to resurrect the argument, ultimately rejected under the original Act in *Calbeck* v. *Travelers Insurance Co.*, *supra*, that federal coverage does not reach maritime injuries on the water if they are not directly related to navigation and commerce. See also *Davis* v. *Department of Labor*, 317 U.S. 249 (1942). In *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), the Court specifically endorsed the continuing validity of *Calbeck* and *Davis* under the amended Act. See Pet. 14-15.

Perini also misunderstands *Ford's* rejection of a geographic test for determining the status of employees *not* injured on actual water (Br. in Opp. 9). The argument advanced by the employer in *Ford* was that "the 1972 Act covers *only* workers who are

working or who may be assigned to work over the water itself." 444 U.S. at 77 (emphasis added). The Court rejected that argument because it would have created a second geographic limitation, narrower than the one contained in the Act's situs provision, 33 U.S.C. 903(a). 444 U.S. at 78. As previously explained (Pet. 11-13), the Court's rationale in *Ford* does not preclude the Director's argument that maritime employment under the amendments necessarily includes all work performed on actual navigable waters and previously covered under the amended Act. Contrary to the situation in *Ford*, where imposition of a geographic component to the status test would have created a limitation on the Act's coverage *narrower* than that contained in 33 U.S.C. 903(a), classification of employment upon actual navigable waters as "maritime employment" furthers the remedial purposes of the 1972 amendments. See *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 268 (Act is to be liberally construed with "an expansive view of [its] extended coverage").

3. Finally, Perini contends that all federal courts have consistently applied the "navigation and commerce" test (Br. in Opp. 15) and glosses over any conflicts in result as "factual" matters (Br. in Opp. 18) not meriting the attention of this Court. The unpredictable results and conflicting opinions engendered by the approach adopted by the decision below, however, are not so readily dismissed.

Gilliam v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir. 1981), petition for cert. pending, No. 81-1039, clearly demonstrates that the confusion regarding LHWCA coverage for injuries occurring on actual navigable waters is not merely "dependent upon the particular factual circumstances of each case" (Br. in Opp. 17-18). In *Gilliam*, the Fifth Circuit found

coverage for a marine construction worker who, like Churchill, was injured while unloading supplies from a barge. Perini characterizes Churchill's work as "[t]he mere act of lifting materials in the course of construction" (Br. in Opp. 17).[6] But in both cases the claimants were lifting construction materials from vessels on navigable waters prior to using those materials in marine construction projects. The finding of "maritime employment" in *Gilliam* cannot be reconciled with the rejection of Churchill's claim on virtually identical facts. See Pet. 16.

The most recent Fifth Circuit cases illustrate the confusion that currently exists in determining coverage for workers injured upon actual navigable waters. As previously noted (Pet. 10-11), the Fifth Circuit in *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, 593 (1981), petition for cert. pending, No. 81-1109, quoted with approval the language of the first *Fusco* opinion that " 'Congress took it for granted [in 1972] that injuries occurring upon water were covered and would remain covered.' " Subsequently, another Fifth Circuit panel observed that, in light of the legislative history of the 1972 amendments, "a persuasive argument could be made that any worker who would have been covered under the pre-1972 LHWCA is still covered under the post-1972 LHWCA." *Boudreaux* v. *American Workover, Inc.*, 664 F.2d 463, 467 (5th Cir. 1981), rehearing en banc granted (Jan. 11, 1982). While the court

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[6] Perini contends that "[t]he mere act of lifting materials in the course of construction does not transform a construction worker into a longshoreman" (Br. in Opp. 17). The Act, however, covers not only longshoremen, but also "*other person*[*s*] engaged in longshoring operations * * *." 33 U.S.C. 902(3) (emphasis added).

of appeals ultimately rejected this rationale in finding coverage for an oilfield specialty worker injured on a semi-submersible drilling rig, the court did state that coverage was proper because the work "takes place primarily upon the navigable waters." 664 F.2d at 468. Finally, in *Pippen* v. *Shell Oil Co.*, 661 F.2d 378 (1981), the Fifth Circuit found coverage under the Act for a wireline operator working on a vessel used to drill gas wells, even though the inherent nature of the claimant's duties was not maritime in any traditional sense. "To reach this conclusion, of course, we must to some extent look to location. Whereas onshore drilling and production cannot be considered maritime commerce, offshore drilling and production can be considered maritime commerce because of its location." *Id.* at 384 n.9. The *Ford* case, the court concluded, does "not forbid a consideration of location to determine whether activity is maritime commerce." *Ibid.*

Unlike the Fifth Circuit, as reflected in these cases, the Second Circuit has precluded any meaningful consideration of the situs of an injury occurring upon actual navigable waters in its construction of "maritime employment." The disparity of results between the two circuits results from more than mere factual discrepancies, and warrants the attention of this Court.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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QUESTION PRESENTED

Whether a marine construction worker injured while working on actual navigable waters is "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), and is thus covered by the Act.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, claimant Raymond Churchill and Hartford Accident & Indemnity Company are respondents in this Court.

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TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Summary of argument	5
Argument	9
A marine construction worker injured upon actual navigable waters, who would have been covered before the 1972 LHWCA amendments, is "engaged in maritime employment" within the meaning of Section 2(3) of the amended Act	9
A. In amending the Act in 1972, Congress intended to extend federal coverage to workers on shore, not to withdraw coverage from workers who are injured while at work on actual navigable waters	10
1. Maritime jurisdiction before the 1927 Act	10
2. Coverage under the 1927 Act	13
3. Coverage under the 1972 amendments	18
B. The "maritime employment" requirement of the amended Act does not incorporate the previously discredited "significant relationship to navigation or commerce" test	24
1. Retaining LHWCA coverage for all injuries to workers occurring upon actual navigable waters is consistent with the statutory scheme of the 1972 amendments	27
2. The "navigation or commerce" test is not mandated by this Court's decision in *P. C. Pfeiffer Co.* v. *Ford*	28

Argument—Continued Page

3. Adoption of a "navigation or commerce" test would frustrate Congress' intent to provide a sure and effective compensation remedy for all injuries sustained on navigable waters 31

4. Denial of LHWCA coverage to some workers injured on actual navigable waters would result in unacceptable difficulty in administering the LHWCA 38

Conclusion 43

TABLE OF AUTHORITIES

Cases: Page

American Tobacco Co. v. *Patterson*, No. 80-1199 (Apr. 5, 1982) 23
Aparicio v. *Swan Lake*, 643 F.2d 1109 23
Askew v. *American Waterways Operators*, 411 U.S. 325 33
Boudreaux v. *American Workover, Inc.*, 664 F.2d 463, rehearing en banc granted, No. 80-3287 (Jan. 11, 1982) 25
Brown v. *Hydro-Dredge Corp.*, 13 B.R.B.S. 788 41
Brown & Root, Inc. v. *Joygner*, 607 F.2d 1087, cert. denied, 446 U.S. 981 25
Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114 ..... *passim*
Davis v. *Department of Labor*, 317 U.S. 249 ..... *passim*
Edynak v. *Atlantic Shipping, Inc.*, 562 F.2d 215, cert. denied, 434 U.S. 1034 32
Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 32
Fusco v. *Perini North River Associates*, 601 F.2d 659, vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111, cert. denied, 449 U.S. 1131 ..... *passim*
Gilliam v. *Wiley N. Jackson Co.*, 659 F.2d 54, petition for cert. pending, No. 81-1039 39
Grant Smith-Porter Ship Co. v. *Rohde*, 257 U.S. 469 ..... 12, 17, 36
Hahn v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272 33
Hardway Contracting Co. v. *O'Keeffe*, 414 F.2d 657 13
Holcomb v. *Robert W. Kirk & Associates, Inc.*, 11 B.R.B.S. 835, rev'd, 665 F.2d 589, petition for cert. pending, No. 81-1109 ..... 25, 40, 41
Hullinghorst Industries, Inc. v. *Carroll*, 650 F.2d 750, cert. denied, No. 81-693 (Jan. 11, 1982) 27, 37
Knickerbocker Ice Co. v. *Stewart*, 253 U.S. 149 11
LeMelle v. *B. F. Diamond Construction Co.*, No. 81-1559 (4th Cir. May 25, 1982) 25, 28
Matson v. *Perini North River Associates*, 9 B.R.B.S. 967, aff'd mem. 661 F.2d 910 ..... 36, 40

Cases—Continued Page

McGrath v. *E. J. Ring Detective Agency, Inc.*, No. 74-LHCA-245 (Oct. 4, 1974) 41
Miller's Indemnity Underwriters v. *Braud*, 270 U.S. 59 12
Motor Boat Sales, Inc. v. *Parker*, 116 F.2d 789, rev'd, 314 U.S. 244 15-16
Nacirema Operating Co. v. *Johnson*, 396 U.S. 212 ..... 13, 18
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 23
Nogueira v. *New York, N.H. & H.R.R.*, 281 U.S. 128 14
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... *passim*
Northern Coal & Dock Co. v. *Strand*, 278 U.S. 142 12
P. C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 ..... 7, 10, 13, 20, 27, 28, 29, 30
Pennsylvania R.R. v. *O'Rourke*, 344 U.S. 334 ..... 14-15, 35
Pippen v. *Shell Oil Corp.*, 661 F.2d 378 30-31
Robins Dry Dock & Repair Co. v. *Dahl*, 266 U.S. 449 12
Seas Shipping Co. v. *Sieracki*, 328 U.S. 85 23
Sedmak v. *Perini North River Associates*, 9 B.R.B.S. 378, aff'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F.2d 659 41
Sharp v. *Pacific Gas & Electric Co.*, 2 B.R.B.S. (ALJ) 25, aff'd 2 B.R.B.S. 381 41
Southern Pacific Co. v. *Jensen*, 244 U.S. 205 ..... 11, 12, 17, 18, 19, 29, 33
Sultan Ry. & Timber Co. v. *Department of Labor*, 277 U.S. 135 ..... 12, 35
Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 ..... *passim*
Travelers Insurance Co. v. *Branham*, 136 F.2d 873 13
Travelers Insurance Co. v. *Calbeck*, 293 F.2d, 52, rev'd, 370 U.S. 114 15
Union Oil Co. v. *Pillsbury*, 63 F.2d 925 16
Voris v. *Eikel*, 346 U.S. 328 35
Walter Tantzen, Inc. v. *Shaughnessy*, 601 F.2d 670, vacated and remanded, 446 U.S. 905 25-26

Cases—Continued — Page

Washington v. *W. C. Dawson & Co.*, 264 U.S. 219 .. 11
Western Fuel Co. v. *Garcia*, 257 U.S. 233 12
Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957, cert. denied, 429 U.S. 868 32

Statutes:

Act of Oct. 6, 1917, ch. 9, 40 Stat. 395 11
Act of June 10, 1922, ch. 216, 42 Stat. 634 11
Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 *et seq.* 13
Section 2(3), 44 Stat. 1425 (33 U.S.C. (1970 ed.) 902(3)) 13
Section 2(4), 44 Stat. 1425 (33 U.S.C. (1970 ed.) 902(4)) 14, 15
Section 3(a), 44 Stat. 1426 (33 U.S.C. (1970 ed.) 903(a)) 13, 15, 22
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. III) 901 *et seq.* 3
Section 2(3), 33 U.S.C. 902(3) ..... *passim*
Section 3(a), 33 U.S.C. 903(a) 2, 7, 15, 19, 20, 21, 23, 28, 29
Section 3(a)(1), 33 U.S.C. 903(a)(1) 10
Section 5(b), 33 U.S.C. 905(b) 22-23
Section 19, 33 U.S.C. (& Supp. III) 919 4
Section 21(b)(3), 33 U.S.C. 921(b)(3) 4
Section 21(c), 33 U.S.C. 921(c) 5

Miscellaneous:

1A *Benedict on Admiralty* (7th ed. 1981) 32, 35
G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) 13, 14, 35
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H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972) 6, 20, 21
4 A. Larson, *The Law of Workmen's Compensation* (1981) 12
S. Rep. No. 973, 69th Cong., 1st Sess. (1926) 37
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 6, 19, 20, 21, 23, 24, 35
Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683 (1973) 35

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 652 F.2d 255. The opinion of the Benefits Review Board (Pet. App. 9a-28a) is reported at 12 B.R.B.S. 929. The decision of the Administrative Law Judge (Pet. App. 29a-32a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a-8a) was entered on June 17, 1981. On September 8, 1981, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including

November 13, 1981. The petition for a writ of certiorari was filed on November 12, 1981, and was granted on February 22, 1982 (A. 21). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), provides in pertinent part:

> Compensation shall be payable under this [Act] in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

2. Section 2(3) of the Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

STATEMENT

1. Raymond Churchill, an employee of respondent Perini North River Associates, was injured in a job-related accident at the site of the North River Pollution Control Project, a sewage treatment plant under construction on the Hudson River in New York City (Pet. App. 3a, 29a-30a). Perini had contracted to build the foundation or substructure for the plant, which extends approximately 700 feet over the Hudson River between 135th and 145th Streets in Manhattan (*id.* at 30a). The construction contract required Perini to "place 2,300 hol-

low circular pipes, called caissons, in navigable waters down to embedded rock, to fill the caissons with concrete, to connect them together at proper elevations above the water with concrete beams, and to place precast concrete slabs on top of the beams." *Fusco* v. *Perini North River Associates*, 601 F.2d 659, 661 (2d Cir. 1979) (*Fusco I*), vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111 (1980) (*Fusco II*), cert. denied, 449 U.S. 1131 (1981).[1] The caissons were delivered by railroad to the New Jersey side of the Hudson River, where they were loaded onto supply barges and towed across the river to await unloading and installation (A. 7-8, 18-19). Employees on the construction project worked from barges (A. 7-8) and float stages (A. 16-17) or from parts of the uncompleted substructure.

Raymond Churchill is a dockbuilder foreman and has been a member of the dockbuilders' union for more than 20 years (Pet. App. 3a). On the North River Project, Churchill was in charge of all work performed on one of the crane barges used to load and unload caissons and other construction materials from supply barges and to set caissons in position for driving into the river bed (*id.* at 11a-12a, 14a-15a; A. 6-8, 19). Churchill was injured on the deck of his crane barge on October 9, 1974, while giving signals to a crane operator engaged in unloading a caisson from a supply barge (Pet. App. 30a; A. 9-11). As the caisson was being lifted, the "tag line" attached to the bottom of the caisson to keep it from turning suddenly became taut and struck Churchill with enough force to hurl him about 15 feet (Pet. App. 3a; A. 11-12), resulting in injuries to his left leg, thumb, and head (Pet. App. 30a).

2. Churchill filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. III) 901 *et seq.* Respondent Perini denied that Churchill was covered by the Act,

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[1] This description of the project was adopted by the court below (Pet. App. 3a & n.2).

and the case was referred to an administrative law judge (ALJ) for a formal hearing on the coverage issue, pursuant to 33 U.S.C. (& Supp. III) 919. After an evidentiary hearing, the ALJ held that Churchill's injury was not covered by the Act. The ALJ concluded that Churchill was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3), because his job did not have a significant relationship to navigation and commerce over navigable waters (Pet. App. 31a):

> It is determined here that claimant's employment was not maritime in [the] traditional sense, but was customary construction work. Indeed, it is typical of the support tasks performed for any construction project—irrespective of location. Mere construction over navigable water here does not magically convert his work, lacking even a remote connection to navigation and commerce, into maritime employment.[2]

Churchill and the Director, Office of Workers' Compensation Programs, appealed to the Benefits Review Board pursuant to 33 U.S.C. 921(b)(3). The Board consolidated the appeals with five other cases involving Perini employees and affirmed the ALJ's denial of coverage by a 2-1 vote (Pet. App. 11a-16a). Relying on the Second Circuit's second decision in *Fusco II*, *supra*, 622 F.2d at 1111,[3] which involved the same employer and construction of the same project, the Board held that marine construction workers building facilities that are not ultimately used in navigation or commerce on navigable waters are not engaged in "maritime em-

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[2] The ALJ similarly concluded that Churchill was not a "harborworker," one of the specifically enumerated categories of maritime employees listed in Section 2(3), because of the nature of the facility being constructed. He reasoned that Churchill "was not building a dock, pier, wharf, or any other type of harbor facility. He was building a foundation for a sewage disposal plant which happened to extend over navigable water" (Pet. App. 31a-32a).

[3] See pages 24-26, *infra*.

ployment" (Pet. App. 13a). The Board also rejected the contention that Churchill's duties, which included unloading construction materials from barges, were alone sufficient to bring him within the Act's coverage as a "person engaged in longshoring operations" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3) (Pet. App. 14a-15a). Board Member Miller dissented because, in his view, "all injuries sustained in the course of employment by employees over 'navigable waters,' as that term was defined prior to the 1972 Amendments, are covered under the [amended] Act" (*id.* at 17a). He also contended that this Court's rationale in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715 (1980), compelled a finding of coverage under the amended federal Act (Pet. App. 21a-22a).

Churchill sought review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c). The Director participated as a respondent and filed a brief in support of Churchill's petition for review. The court denied the petition, relying on its earlier denial of coverage to workers injured on the same construction project in the *Fusco* litigation.[4] The court concluded that a marine construction worker who is injured while unloading a barge upon actual navigable waters is not a covered "maritime" employee under the amended Act because his employment lacks a "significant relationship to navigation or to commerce on navigable waters" (Pet. App. 2a n.1).

SUMMARY OF ARGUMENT

The court of appeals improperly denied coverage under the Longshoremen's and Harbor Workers' Compensation Act to a maritime worker injured on actual navigable waters. The original LHWCA was enacted by Congress

[4] While admitting that "the question is certainly not free from doubt" (Pet. App. 6a), the court of appeals concluded that this Court's rationale in *Sun Ship* did not require a reformulation of the standard for coverage adopted in the *Fusco* litigation (*id.* at 4a-6a).

in 1927 in response to decisions of this Court that held that state workers' compensation remedies could not constitutionally extend to employees injured upon actual navigable waters if their employment possessed a direct relationship to navigation or commerce. For nearly 35 years following the passage of the original legislation, federal courts struggled under the "maritime-but-local" doctrine to determine which injuries over navigable waters were remediable under state compensation acts and which fell exclusively within the jurisdiction of the LHWCA because the employment at issue was significantly related to navigation or commerce. In *Davis* v. *Department of Labor*, 317 U.S. 249 (1942), and *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962), this Court finally put an end to this "jurisdictional monstrosity" by declaring that federal jurisdiction extended to all injuries occurring on actual navigable waters, regardless of whether the particular employment involved was directly related to traditional concepts of navigation or commerce. *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 720 (1980).

The 1972 amendments to the LHWCA do not revive the "jurisdictional dilemma" that prevailed prior to this Court's "clarifying opinions in *Davis* and *Calbeck*." *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 720. The undisputed congressional intent behind the 1972 amendments was to *extend* LHWCA coverage ashore "to permit a uniform compensation system to apply to employees who would otherwise be covered * * * for [only] part of their activit[ies]." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972). Congress expressly declared that the amendments did not *withdraw* coverage from "employees traditionally covered." S. Rep. No. 92-1125, *supra*, at 16. Thus, the amendments were not designed to withdraw the coverage that previously had been held to exist for employees injured while working on actual navigable waters. Congress, moreover, ex-

plicitly repealed a provision of the 1927 Act that had been interpreted as restricting federal coverage to employment on the water possessing a significant relationship to navigation or commerce. There is therefore no basis for the court of appeals' conclusion that federal jurisdiction under the amended Act extends only to employment possessing a significant relationship to navigation or commerce.

Preserving LHWCA coverage for all injuries occurring on actual navigable waters is entirely consistent with the statutory scheme of the amended Act. Coverage under the Act as amended in 1972 hinges upon the "situs" of the injury and the "status" of the injured employee. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). An injury occurring on actual navigable waters clearly meets the "situs" test. 33 U.S.C. 903(a). A worker injured in the course of his regular employment over navigable waters, furthermore, meets the "status" test of Section 2(3) of the Act, 33 U.S.C. 902(3). Workers injured upon actual navigable waters are perforce engaged in "maritime employment," because they must daily face the difficulties, dangers, and challenges of working in a marine environment. This conclusion does not conflict with this Court's reasoning in *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 79 (1979), that "maritime employment" embodies "an occupational rather than a geographic concept." Nothing in that opinion purports to exclude the location of an employee's work activities from the determination of "maritime employment." Rather, the opinion stresses that "the crucial factor" in making that determination "is the nature of the activity to which a worker may be assigned." 444 U.S. at 82. No factor is more important in evaluating the maritime nature of any employment than the fact that it takes place upon actual navigable waters.

Moreover, restricting federal coverage under the LHWCA to employment on the water that meets the technical dictates of the "navigation or commerce" test would under-

mine the central purpose of the amended Act. The federal compensation remedy embodied in the LHWCA was designed to provide workers with "sure and certain relief" (*Davis* v. *Department of Labor*, *supra*, 317 U.S. at 254) without "uncertainty as to the source, state or federal, of that remedy." *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 124. Confining LHWCA coverage to employment meeting the "navigation or commerce" test would result in the creation of two discrete jurisdictional spheres for injuries occurring upon navigable waters: the LHWCA would apply solely to employment meeting the "navigation or commerce" test, whereas state compensation remedies alone would apply to injuries lacking that elusive requirement. Because "the boundary at which state remedies [give] way to federal remedies [is] far from obvious in individual cases * * * the injured worker [would therefore be] compelled to make a jurisdictional guess before filing a claim," with the price of error being "unnecessary expense and possible foreclosure from the proper forum by statute of limitations." *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 718. This result, which the Court has consistently rejected, should not be permitted to prevail under the 1972 amendments.

Unless federal jurisdiction under the amended Act is preserved for all injuries occurring upon actual navigable waters, this and other federal courts will once again become embroiled in the futile search for a definite dividing line between federal and state jurisdiction in individual cases. Injured employees seeking coverage under the Act will be "thrust * * * into the same jurisdictional peril from which they were rescued by *Davis* and *Calbeck* v. *Travelers Insurance Co.*" (*Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 725), and the administrative tribunals and federal courts administering the Act will confront a rapidly expanding maze of conflicting coverage decisions. "The legislative policy animating the LHWCA's landward shift was remedial; the amendments'

framers acted out of solicitude for the workers." *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 725-726. To affirm the decision below "would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid the injured maritime laborers." *Id.* at 726.

ARGUMENT

A MARINE CONSTRUCTION WORKER INJURED UPON ACTUAL NAVIGABLE WATERS, WHO WOULD HAVE BEEN COVERED BEFORE THE 1972 LHWCA AMENDMENTS, IS "ENGAGED IN MARITIME EMPLOYMENT" WITHIN THE MEANING OF SECTION 2(3) OF THE AMENDED ACT

The court of appeals' decision denies coverage under the Longshoremen's and Harbor Workers' Compensation Act to a marine construction worker who was injured upon actual navigable waters and who would have been covered under the Act before the 1972 amendments. This case thus presents a straightforward issue of statutory construction left unanswered by the Court in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977): "[W]hether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined."

The court of appeals erred in concluding that Section 2(3) of the amended Act necessarily demands that a worker injured on actual navigable waters demonstrate that his work bears a " 'significant relationship to navigation or to commerce on navigable waters' " (Pet. App. 2a n.1, quoting *Fusco II*, *supra*, 622 F.2d at 1113). This requirement, as we show below, is contrary to both the congressional intent in enacting the 1972 amendments and the past decisions of this Court that have rejected such a predicate for federal coverage. As a result of the erroneous application of this "navigation or commerce" test, the court of appeals denied LHWCA coverage to a

worker who would have been covered prior to the 1972 amendments,[5] solely because he was constructing a sewage treatment plant rather than a pier, dock, or some other harbor facility presumably more directly related to traditional navigation or commerce activities.

A. In amending the Act in 1972, Congress intended to extend federal coverage to workers on shore, not to withdraw coverage from workers who are injured while at work on actual navigable waters

The coverage of the Longshoremen's and Harbor Workers' Compensation Act has been inseparably linked with the troublesome question of delineating the scope of state and federal jurisdiction over maritime injuries. To understand fully the congressional intent behind the 1972 coverage amendments, therefore, it is necessary to trace once again the history of the conflict between federal and state jurisdiction in this area. See, *e.g.*, *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 717-719 (1980); *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 72-74 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256-265 (1977).

1. *Maritime jurisdiction before the 1927 Act*

The LHWCA was enacted in 1927 because of the states' constitutional inability to provide workers' compensation remedies for employment injuries occurring on navigable waters.[6] In 1917, this Court held that a state could not apply its workers' compensation remedies to an injury sustained on a gangplank between a vessel and a wharf

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[5] Churchill cannot be viewed as a Jones Act seaman—a "master or member of a crew" excluded from LHWCA coverage by Sections 2(3) and 3(a)(1) of the Act, 33 U.S.C. 902(3) and 903(a)(1)—because he lacked any permanent connection with either the crane barge aboard which his injury occurred or the supply barge from which caissons were being unloaded.

[6] This early history of the federal law is set forth in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962).

because the federal government has the sole power, under the admiralty clause of the Constitution, to regulate such occurrences on the navigable waters of the United States. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). Application of state workers' compensation law to such injuries would "conflict[] with the general maritime law, which constitutes an integral part of the federal law under Art. III, § 2 of the Constitution." *Id.* at 212. The Court reasoned that allowing state law to apply "would impair the harmony and uniformity which the constitutional grant to the Federal Government of the admiralty power was meant to assure." *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 117 (1962). Thus, a boundary was drawn between federal and state jurisdiction that came to be known as the *Jensen* line: injuries on the seaward side of a pier were subject to federal maritime jurisdiction, and injuries shoreward of that line could be protected by state compensation acts. See generally *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 257.

This coverage system proved unsatisfactory in practice, because "the amphibious nature of longshoremen's work made it desirable to have 'one law to cover their whole employment, whether directly part of the process of loading or unloading a ship or not'" (*Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 257, quoting H.R. Rep. No. 639, 67th Cong., 2d Sess. 2 (1922)). In response to the *Jensen* decision, Congress twice passed statutes placing injuries upon the water within the reach of state compensation laws. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395; Act of June 10, 1922, ch. 216, 42 Stat. 634. The *Jensen* line, however, was held to be unyielding. This Court declared both statutes to be unconstitutional delegations of federal admiralty power to the states. *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924).

As a result of *Jensen* and succeeding cases, thousands of maritime workers were denied the benefits of workers'

compensation coverage. The rigors of the *Jensen* line, however, were somewhat softened during this period by the development of the "maritime-but-local" doctrine. Under that doctrine, state workers' compensation law could constitutionally be applied to some "maritime" employment—that is, work on navigable waters—if the particular maritime job was deemed "local in character." The Court's rationale for this seeming break in the *Jensen* line was that if employment was "local," application of state law would not work "material prejudice to the general maritime law," nor would it interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469, 477 (1922), citing *Western Fuel Co.* v. *Garcia*, 257 U.S. 233 (1921). Employment seaward of the *Jensen* line was held to be "maritime-but-local" and thus subject to state regulation if it bore no direct relationship to navigation or commerce. *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 122-123. Compare *Grant Smith-Porter Ship Co.* v. *Rohde*, *supra*, 257 U.S. at 477 (local law could apply because the employment "had no direct relation to navigation"), with *Northern Coal & Dock Co.* v. *Strand*, 278 U.S. 142, 144 (1928) (local law could not apply because the job had a "direct relation to commerce and navigation.")

The "maritime-but-local" doctrine, predictably, engendered considerable litigation.[7] But, despite this litigation, "[n]o dependable definition of the area * * * where state laws could apply ever emerged" from the many decisions of this and other courts that attempted to identify direct relationships to navigation or commerce. *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 119.

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[7] See, *e.g.*, *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U.S. 135, 137 (1928); *Millers' Indemnity Underwriters* v. *Braud*, 270 U.S. 59, 65 (1926); *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U.S. 449, 457 (1925). See also 4 A. Larson, *The Law of Workmen's Compensation* § 89.22 (1981) (and cases cited therein).

2. *Coverage under the 1927 Act*

In response to this state of affairs, in which a maritime employee on the water was deprived of any compensation remedy if his work was deemed to have a direct relationship to navigation or commerce, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 *et seq.*, in 1927. Under the original Act, coverage depended upon where an injury occurred. The general rule was that all injuries sustained during the course of employment on actual navigable waters were covered under the Act, while those incurred on land were not. *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 718 (prior to 1972 "LHWCA comprehended 'all injuries sustained by employees on navigable waters' ") (quoting *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 124); G. Gilmore & C. Black, *The Law of Admiralty* 428 (2d ed. 1975). See also *P. C. Pfeiffer Co.* v. *Ford*, *supra*, 444 U.S. at 72-73; *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 218-220 (1969).[8]

Former Section 3(a) of the Act, 44 Stat. 1426 (previously codified at 33 U.S.C. (1970 ed.) 903(a)), provided that compensation was payable to an injured "employee" for any "injury occurring upon the navigable waters of the United States (including any dry dock) * * *." An "employee" was defined only in negative terms: seamen and persons engaged by a master to load, unload, or repair small vessels were excluded from coverage. See former Section 2(3), 44 Stat. 1425 (previously codified at 33 U.S.C. (1970 ed.) 902(3)). More im-

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[8] Marine construction workers like respondent Churchill, in particular, were covered as long as they were injured on navigable waters. This was true regardless of whether the project under construction was intended to aid navigation or commerce on navigable waters. Compare *Travelers Insurance Co.* v. *Branham*, 136 F.2d 873 (4th Cir. 1943) (labor foreman building a dry dock), with *Hardway Contracting Co.* v. *O'Keeffe*, 414 F.2d 657 (5th Cir. 1968) (laborer building a bridge). See also *Davis* v. *Department of Labor* 317 U.S. 249 (1942) (concurrent state and federal coverage for a construction worker dismantling an abandoned bridge).

portant, Congress specifically rejected an exception to LHWCA coverage for employment "of no direct relation to navigation and commerce" because such an exemption "threatened to perpetuate * * * uncertainties of coverage." *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 122. The Act as adopted used the term "maritime employment" only in a definitional section: an "employer" under the Act was defined as "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." 44 Stat. 1425. The "maritime employment" requirement of the 1927 Act was rarely discussed by the courts, however, because any employee injured while working on the water was assumed to provide the requisite "maritime employment" nexus. G. Gilmore & C. Black, *The Law of Admiralty*, *supra*, at 428; see also *Pennsylvania R.R.* v. *O'Rourke*, 344 U.S. 334, 339-340 (1953); *Nogueira* v. *New York, N.H. & H.R.R.*, 281 U.S. 128, 131-132 (1930). As Professors Gilmore and Black note, the question whether a worker was employed by a statutory "employer" meeting the "maritime employment" test did not, "before the 1972 amendments, account[] for any litigation." G. Gilmore & C. Black, *The Law of Admiralty*, *supra*, at 428. There was some litigation regarding whether particular workers were excluded from the Act as Jones Act seamen, but virtually none regarding whether particular workers were engaged by a statutory "employer." "Workers who are not seamen but who nevertheless suffer injury on navigable waters are no doubt (or so the courts have been willing to assume) engaged in 'maritime employment'. * * * [N]o one seems to have doubted that they could recover under the L[W]HCA, provided only that the proof satisfied the 'navigable waters' test." *Ibid.*[9]

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[9] *Pennsylvania R.R.* v. *O'Rourke*, *supra*, 344 U.S. at 339-340, and cases cited therein, make it clear that under the 1927 Act workers injured on actual navigable waters were engaged in "maritime employment" even when their jobs were the type typically performed

The clearest pre-1972 analysis of when a particular employment can be considered "maritime" is contained in cases struggling with the "maritime-but-local" doctrine. The federal-state jurisdictional dilemma continued unabated after 1927 for those workers injured on navigable waters whose employment was arguably not directly related to navigation or commerce. Section 3(a) of the original Act provided that employees were covered only "if recovery * * * may not validly be provided by State law." 33 U.S.C. (1970 ed.) 903(a). Many courts construed this proviso as excluding from federal coverage any employment that was previously held to be within the constitutional reach of the states before the federal Act was passed, notwithstanding the fact that Congress had specifically rejected an exemption from LHWCA coverage for "employment of local concern." *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 122 (emphasis deleted). Thus, courts applied with considerable travail the "navigation or commerce" test to determine whether a particular job was "maritime" within the scope of the federal Act, or "maritime-but-local" and therefore outside the coverage of the LHWCA. See, *e.g.*, *Travelers Insurance Co.* v. *Calbeck*, 293 F.2d 52, 56 (5th Cir. 1961) ("those on the 'admiralty' side are exclusively covered by the Longshoremen's Act; those on the 'maritime but local' side are state"; footnote omitted), rev'd, 370 U.S. 114 (1962); *Motor Boat Sales, Inc.* v. *Parker*, 116 F.2d 789,

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on land. In *O'Rourke*, for example, the Court concluded that a railroad brakeman injured on a car float operation was covered under the Act. The Court's implicit assumption that the brakeman supplied the "maritime employment" nexus necessary to impose liability on the railroad as an "employer" under 33 U.S.C. 902(4) was strongly challenged by the dissent, which claimed that there was "but one question" in the case—"whether [the brakeman] was engaged in 'maritime employment' at the time of his injury." 344 U.S. at 342 (Minton, J., dissenting). The majority, however, disregarded the dissent's invitation to look to the "nature of the employment" (344 U.S. at 343) to revoke the coverage of a worker injured on actual navigable waters.

792-793 (4th Cir.), rev'd, 314 U.S. 244 (1941); *Union Oil Co.* v. *Pillsbury*, 63 F.2d 925 (9th Cir. 1933).

After 15 years of struggling with the unpredictable "maritime-but-local" doctrine on a case by case basis, this Court attempted to bring some order to this federal-state jurisdictional quagmire in *Davis* v. *Department of Labor*, 317 U.S. 249 (1942). *Davis* was a maritime construction coverage case much like the instant one, involving a structural steelworker who drowned after falling from a barge while dismantling an abandoned bridge across a navigable river. 317 U.S. at 251. The question was whether a state workers' compensation law could apply in such a situation, even though the state supreme court had concluded that the claimant's employment was unquestionably maritime and beyond the limits of state coverage, because it was not of purely local concern. This Court noted that the claimant's employment occupied a "shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." 317 U.S. at 253. Determination of whether a particular employment was "maritime" and strictly federal or "maritime-but-local," furthermore, had become "extremely difficult." *Ibid.* Notwithstanding the difficulty of the question, however, "employees are asked to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership. As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." *Id.* at 254. Noting that the "horns of the jurisdictional dilemma press as sharply on employers as on employees" (*id.* at 255), the Court determined that some employment on navigable waters lay within a "twilight zone" that could validly be reached by either state workers' compensation law or the LHWCA. *Id.* at 256. The Court therefore reversed the decision of the state supreme court and permitted recovery under

state law notwithstanding the fact that the technical dictates of the "maritime-but-local" doctrine did not clearly indicate that result.

The final blow to the "maritime-but-local" doctrine came 20 years after *Davis* in *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962). In *Calbeck*, federal coverage was sustained for workers injured while constructing new vessels afloat upon navigable waters—maritime employment that traditionally had been held to be "local" and thus subject to exclusive state jurisdiction. See *Grant Smith-Porter Ship Co.* v. *Rohde*, *supra*. The Court completely abolished the "maritime-but-local" exception to federal coverage for injuries occurring on navigable waters, reasoning that by enacting the LHWCA Congress had intended to establish concurrent jurisdiction over "maritime-but-local" employment: injuries on the water having no direct relationship to navigation or commerce were compensable under both federal and state law.

"There emerges from the complete legislative history" of the federal Act, the Court said, "a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where *Jensen* might have seemed to preclude state compensation." *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 120-121. The Court noted (*id.* at 122-123) that Congress had deleted from the original version of the Act a "local concern" exception to LHWCA coverage for employment of "no direct relation to navigation and commerce" because of the demonstrable uncertainty of such a test. Although the courts had imported the test back into the Act, after years of litigation "the contours of the 'local concern' concept * * * have remained necessarily vague and uncertain." *Id.* at 124-125. This confusion negated one of "the chief purposes of the Longshoremen's Act" (*id.* at 126), because the Act was "designed to ensure that a compensation remedy existed for all injuries sustained by employees on navi-

gable waters, and to avoid uncertainty as to the source, state or federal, of that remedy." *Id.* at 124. The Court therefore concluded that Congress intended the Act to reach "all those cases of injury to employees on navigable waters as to which *Jensen* * * * had rendered questionable the availability of a state compensation remedy" (*id.* at 126; footnote omitted), whether or not the particular maritime employment was directly related to navigation or commerce and thus also "within the constitutional reach of a state workmen's compensation law" (*id.* at 127; footnote omitted).

3. *Coverage under the 1972 amendments*

Following this Court's decisions in *Davis* and *Calbeck*, it was finally clear that federal coverage extended to all injuries occurring over actual navigable waters. Other decisions of the Court, moreover, made it equally clear that coverage stopped at the water's edge. *Nacirema Operating Co.* v. *Johnson*, *supra*, 396 U.S. at 219. See also *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 719 ("[I]njuries suffered beyond navigable waters—albeit within the range of federal admiralty jurisdiction—were remediable only under state law"). But, while the jurisdictional reach of the LHWCA was finally settled (injuries occurring on the water were covered under the Act, those occurring on land were not), the coverage provided by the Act was somewhat irrational. Amphibious workers, such as longshoremen, continually walked in and out of federal coverage during the course of their working day, each time they crossed the *Jensen* line.

In 1972, Congress undertook the first major revision of the LHWCA since 1927. The main concern of these amendments, however, "was not with the scope of coverage but with accommodating the desires of three interested groups: (1) shipowners who were discontented with the decisions allowing many maritime workers to use the doctrine of 'seaworthiness' to recover full damages from

shipowners regardless of fault; (2) employers of the longshoremen who, under another judicially created doctrine, could be required to indemnify shipowners and thereby lose the benefit of the intended exclusivity of the compensation remedy; and (3) workers who wanted to improve the benefit schedule deemed inadequate by all parties." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 261 (footnote omitted). Congress resolved these concerns by eliminating "seaworthiness" suits by maritime employees covered under the Act, outlawing indemnification actions by shipowners, and substantially increasing the benefits payable under the Act. *Id.* at 261-262.

While the coverage of the 1927 Act was not a major motivating factor behind the 1972 amendments, the substantially increased benefit schedule of the amended Act heightened the perceived irrationality of the *Jensen* line's demarcation of federal coverage. *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 262-263. As the Senate report on the amendments stated: "It is apparent that if the Federal benefit structure embodied in [the] Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred * * *." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972). The report noted that the "compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water." *Ibid.* Congress, therefore, extended LHWCA coverage ashore for the first time by defining certain areas landward of the *Jensen* line as "navigable waters" under the Act. Thus, amended Section 3(a) directs that compensation be paid for death or disability resulting from an injury "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in

loading, unloading, repairing or building a vessel)." 33 U.S.C. 903(a).

This shoreward extension of coverage solved a long-standing problem for longshoremen, shipbuilders, and other amphibious workers who, under the old Act, had walked in and out of coverage during the course of their working day. See S. Rep. No. 92-1125, *supra*, at 13; H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. 10-11 (1972); *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 273. But, in the course of resolving this problem, Congress created a new one: many employees working in the newly covered shoreside areas were engaged in employment with no maritime connection whatsoever. While such workers had rarely wandered onto the covered situs when the Act was limited to injuries on navigable waters, with the Act's newly expanded situs "it became necessary to describe affirmatively the class of workers Congress desired to compensate." *Id.* at 264. Congress, therefore, amended the definition of "employee" to cover "person[s] engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *." 33 U.S.C. 902(3). The question presented here is whether the "maritime employment" requirement of Section 2(3) has placed some traditionally covered workers outside the protection of the amended Act.

Although the legislative history of the 1972 coverage amendments is not extensive, the indisputable congressional purpose behind those amendments was to expand coverage under the Act "to protect *additional* workers." S. Rep. No. 92-1125, *supra*, at 1 (emphasis added). *P. C. Pfeiffer Co.* v. *Ford*, *supra*, 444 U.S. at 73; *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 251. Contrary to the court of appeals' conclusion, Congress clearly did not intend to exclude from coverage any employee who was injured during the course of his regular

employment on actual navigable waters and who would have been covered under the original Act.

The amendments to Section 2(3) of the Act, defining "employee," and to Section 3(a), the general coverage provision, were discussed in both the Senate and House reports under the heading: "Extension of Coverage to Shoreside Areas." S. Rep. No. 92-1125, *supra*, at 12-13; H.R. Rep. No. 92-1441, *supra*, at 10-11. The unmistakable assumption of the reports is that existing coverage for injuries on the water would remain intact; the amendments merely extended LHWCA coverage to shoreside activities not previously covered.[10] "The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 92-1125, *supra*, at 13; H.R. Rep. No. 92-1441, *supra*, at 10-11. Churchill, like all amphibious workers, was "covered by this Act for part of [his] activity" before the amendments. Congress meant to extend that coverage to his activities ashore—not to withdraw it from his work afloat. Indeed, this congressional intent is explicitly stated in the Senate report:

> [A]mend[ed] section 2(3) * * * specifically includes any longshoreman or other person engaged in longshoreing [*sic*] operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. *It does not exclude other employees traditionally covered* * * *.

S. Rep. No. 92-1125, *supra*, at 16 (emphasis added).

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[10] Such an assumption is not inconsistent with the fact that coverage under the amended Act hinges on "both the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 265. A worker, like Churchill, who is injured on actual navigable waters is perforce engaged in maritime employment at the time of injury. Churchill's employment, for example, required the use of barges, float stages, life jackets, and special procedures for construction on water, and exposed him to conditions of employment that were uniquely maritime. See discussion at pages 27-28, *infra*.

There is, furthermore, absolutely no hint in the legislative history of the 1972 amendments that Congress intended to revive the "maritime-but-local" doctrine by requiring that workers injured on actual navigable waters demonstrate a "substantial relationship to navigation or commerce" before becoming eligible for federal benefits. To the contrary, Congress in 1972 eliminated the former requirement that LHWCA coverage be extended only if recovery "may not validly be provided by State law" (former Section 3(a), 44 Stat. 1426 (previously codified at 33 U.S.C. (1970 ed.) 903(a)). Prior to this Court's unravelling of the "martime-but-local" doctrine in *Davis* and *Calbeck*, that provision frequently had been cited as limiting federal coverage on the water to employment possessing a significant, albeit ill-defined, relationship to navigation and commerce. See *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 136 (Stewart, J., dissenting). Far from imposing such a requirement anew, then, the 1972 amendments affirmatively evidence Congress' intent to do away with the troublesome "maritime-but-local" doctrine and its unpleasant baggage—the "navigation or commerce" test. As this Court noted in *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 721, "[i]t would be a *tour de force* of statutory misinterpretation" to conclude that congressional amendments that *removed* phrasing arguably establishing a navigation or commerce test also "manifest[ed] the intent to command such [a test]."

Finally, withdrawing LHWCA coverage from workers like Churchill who are injured on actual navigable waters thwarts one of the primary congressional objectives behind enactment of the 1972 amendments. As noted earlier, one of the fundamental concerns prompting the amendments was Congress' desire to eliminate strict liability "seaworthiness" suits by maritime workers against vessel owners. The 1972 amendments abolished such suits for all "person[s] covered under this [Act]." 33 U.S.C. 905 (b). If marine construction workers like Churchill are not covered by the LHWCA, however, they are also freed

from the constraint of 33 U.S.C. 905(b). *Aparicio* v. *Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981). Since Churchill, at the time of his injury, was "working on board [a vessel] in navigable waters," he is almost certainly "entitled to the seaman's traditional and statutory protections," including the right to a strict liability tort recovery under the "seaworthiness" doctrine, because he was "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 99 (1946); *Aparicio* v. *Swan Lake*, *supra*, 643 F.2d at 1116-1118. A broad subject area therefore remains for utilization of the seaworthiness remedy Congress intended to abolish. S. Rep. No. 92-1125, *supra*, at 10. The 1972 amendments should not be construed in a way that conflicts so sharply with expressed congressional intent.

Congress did not inadvertently withdraw coverage from some workers by adding the "maritime employment" requirement to Section 2(3) of the amended Act, 33 U.S.C. 902(3). The legislative design to retain the traditional coverage of the 1927 Act is clearly and forcefully expressed in the legislative history of both Sections 2(3) and 3(a) of the amended Act. Nor was Congress blind to the troubled courtroom history of the LHWCA. Instead of mandating that courts undertake a frustrating and perhaps futile search for "substantial relationships to navigation or commerce" under the amended Act, Congress removed language from the Act that had previously been construed to require such an inquiry. See *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 720-721. This evidence is flatly inconsistent with the court of appeals' view that the 1972 amendments somehow stripped workers of pre-existing coverage under the 1927 Act. "If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974). See *American Tobacco Co.* v. *Patterson*, No. 80-1199 (Apr. 5, 1982), slip op. 8-9 n.6.

B. The "maritime employment" requirement of the amended Act does not incorporate the previously discredited "significant relationship to navigation or commerce" test

The Second Circuit has not always demanded a "significant relationship to navigation or commerce" before finding coverage under the 1972 amendments for injuries occurring on actual navigable waters. In earlier litigation involving the same employer and construction project involved in the present case, the court concluded that marine construction workers who were injured on the water and who would have been covered under the 1972 Act retained their status as "maritime" employees under the 1972 amendments. See *Fusco* v. *Perini North River Associates*, 601 F.2d 659 (2d. Cir. 1979) (*Fusco I*), vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F.2d 1111 (1980) (*Fusco II*), cert. denied, 449 U.S. 1131 (1981).[11] In *Fusco I*, after thoroughly analyzing the judicial construction of the LHWCA and the legislative history of the 1972 amendments, the Second Circuit concluded that "*Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility*" (601 F.2d at 669 (emphasis in original)). The court thus rejected the "significant relationship to navigation or commerce" test, reasoning that when the Senate Committee stated that the amended Act "does not exclude other employees traditionally covered" (S. Rep. No. 92-1125, *supra*, at 16), it obviously meant all employees previously covered by the Act and not merely those whose work was

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[11] The Second Circuit concluded that both claimants in *Fusco II* had been injured on the water. 601 F.2d at 663. The record, however, failed to establish definitively that they were injured on actual navigable waters rather than on construction structures already permanently affixed to land. See 80-639 and 80-651 Brief for Federal Respondent in Opposition at 18.

traditionally deemed directly related to navigation or commerce. 601 F.2d at 667.

The analysis of the *Fusco I* court is sound, and its approach has been followed by other courts of appeals. The Fifth Circuit recently cited the *Fusco I* opinion and quoted from it at length in finding LHWCA coverage for a night watchman who fell through an open hatch of a vessel afloat on navigable waters. *Holcomb* v. *Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, 592-593 (1981), petition for cert. pending, No. 81-1109. See also *Boudreaux* v. *American Workover, Inc.*, 664 F.2d 463, 467 (5th Cir. 1981), rehearing en banc granted, No. 80-3287 (Jan. 11, 1982). The Fourth Circuit used similar reasoning in declaring that a marine construction worker who was injured while constructing a bridge across the James River was a "maritime employee" within Section 2(3) of the amended Act. *LeMelle* v. *B. F. Diamond Construction Co.*, No. 81-1559 (4th Cir. Mar. 25, 1982), slip op. 4-5. The court wrote that it "is not necessary to relate again the tortured history of employee coverage under the LHWCA except to note that bridge construction and demolition workers employed over navigable water were covered prior to the 1972 amendments" (slip op. 5). Quoting from its earlier opinion in *Brown & Root, Inc.* v. *Joyner*, 607 F.2d 1087, 1090 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980), the court concluded (slip op. 5):

> [W]e are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments.

The Second Circuit, however, unfortunately abandoned this analysis in *Fusco II*, *supra*, 622 F.2d at 1111, and in the present case.[12] Instead of considering past judicial

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[12] This Court vacated and remanded both *Fusco I* and *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), for reconsideration in light of *P. C. Pfeiffer Co.* v. *Ford*, *supra*. 444

experience in the construction of the LHWCA and the express congressional intent to retain traditional coverage under the amended Act, the court determined that only activities bearing "a significant relationship to navigation or to commerce on navigable water" are "maritime" under Section 2(3) of the 1972 amendments (Pet. App. 2a n.1). This approach threatens to frustrate the central purpose of the LHWCA, which was designed to provide the nation's maritime workers with sure and speedy access to an effective workers' compensation remedy. The "navigation or commerce" test, furthermore, conflicts with the rationale of this Court's recent opinions construing the amended Act because it threatens to recreate the "jurisdictional monstrosity" that existed prior to *Davis* v. *Department of Labor*, *supra*, and *Calbeck* v. *Travelers Insurance Co.*, *supra*. Finally, denial of LHWCA coverage to employees who are injured on actual navigable waters creates substantial practical difficulties in administration of the Act, with various courts reaching divergent conclusions with regard to virtually identical factual situations. The 1972 amendments to the LHWCA are "remedial [legislation] designed to extend [federal] coverage * * *." *Northeast Marine Terminal Co.* v *Caputo*, *supra*, 432 U.S. at 279. They should not be construed to reach these anomalous results.

U.S. 1028; 446 U.S. 905. The court of appeals ruled in *Fusco I* that "any person whose principal duties are performed on navigable waters as that term was understood before 1972" remained covered under the amendments. 601 F.2d at 669. In *Shaughnessy*, however, the Second Circuit stated that *only* those persons whose principal duties were performed on actual navigable waters were covered by the 1972 Act. The *Shaughnessy* court plainly went too far in concluding that maritime employment *requires* some presence on actual navigable waters, but the Second Circuit's subsequent withdrawal in *Fusco II* from the proposition that maritime employment necessarily includes employment that *is* performed on the water is also in error.

1. *Retaining LHWCA coverage for all injuries to workers occurring upon actual navigable waters is consistent with the statutory scheme of the 1972 amendments*

Recent decisions of this Court have established that coverage under the amended LHWCA hinges on "both the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 265. Preservation of LHWCA coverage for workers injured upon actual navigable waters is entirely consistent with this statutory scheme, because such workers unquestionably are injured upon a covered situs while engaged in "maritime employment."

Marine construction workers, like respondent Churchill, are engaged in "maritime employment" despite the fact that other land-based workers may perform similar duties. Loading and unloading supply barges and driving large caissons into the bed of a river while operating from a vessel floating on navigable waters differs in substantial degree from similar construction activities taking place solely upon dry land. Marine construction workers, unlike land-based workers, are constantly on, over, and surrounded by water. Their work is necessarily performed aboard barges, floating rafts, and other vessels. The job, furthermore, exposes them to conditions and hazards that are uniquely maritime: they must wear life jackets and use other protective marine equipment; they usually receive their construction materials and equipment by barge; and they must continually adhere to special procedures, both in the unloading of supplies and materials and in the construction process itself, in order to deal with the exigencies of work on the water. The courts have uniformly held that non-maritime skills, when applied to a maritime project, are "maritime" for coverage purposes. See, e.g., *P. C. Pfeiffer Co.* v. *Ford*, *supra*, 444 U.S. at 82-83; *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750, 756 (5th Cir. 1981), cert. denied, No. 81-693 (Jan. 11, 1982). Maritime construction skills applied

to a supposedly non-maritime project—such as the North River Pollution Control Project—are, if anything, even more deserving of that label. See *LeMelle* v. *B. F. Diamond Construction Co.*, *supra*, slip op. 2, 5-6 ("Although bridge demolition and construction is not classically maritime work under the 'ancient traditions of the sea,' it has long been merged with such work by the exigencies of modern coastal land and sea traffic").

There can be no doubt that a worker injured on actual navigable waters meets the "situs" requirement of the amended LHWCA. 33 U.S.C. 903(a). The practical realities of employment afloat navigable waters should likewise compel the conclusion that such a worker satisfies the "maritime employment" status provision of Section 2(3) of the Act, 33 U.S.C. 902(3).

2. *The "navigation or commerce" test is not mandated by this Court's decision in* P. C. Pfeiffer Co. v. Ford

The court of appeals answered the argument that the 1972 amendments were not intended to remove pre-existing coverage under the LHWCA for workers injured on actual navigable waters by stating that these arguments "are precisely those made in *Fusco I* and rejected in *Fusco II*" (Pet. App. 4a). In *Fusco II*, *supra*, 622 F.2d at 1112-1113, the Second Circuit concluded that the "navigation or commerce" test for "maritime employment" under Section 2(3) of the Act was mandated by this Court's decision in *P. C. Pfeiffer Co.* v. *Ford*, *supra*. The court reasoned that because "maritime employment" is "an occupational rather than a geographic concept" (444 U.S. at 79), employment cannot be deemed "maritime" by virtue of its performance on the water—it must possess a significant relationship to navigation or commerce. The *Ford* decision, however, did not create a "navigation or commerce" test for maritime employment, and nothing in that opinion withdraws from the category of maritime employees those persons who are injured while working on actual navigable waters.

Persons who work upon actual navigable waters are precisely the kind of employees Congress had in mind when it enacted the LHWCA. They are the persons who most need the protection of a federal compensation remedy because their injuries occur upon a situs that, under *Southern Pacific Co.* v. *Jensen*, *supra*, might not be reached by state workers' compensation law. *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 125 (LHWCA covers all injuries on navigable waters to prevent possibility that "some injuries to employees on navigable waters might not be compensable under any statute"). The claimants in *Ford* were not such workers, because their injuries did not occur on actual navigable waters. Indeed, the question before the Court in *Ford* was whether cargo handlers—whose work was done entirely on land—could be "engaged in maritime employment" and therefore covered under the Act even if they were not subject to assignment aboard a vessel in the course of their working day. The question, in short, was whether workers could be engaged in maritime employment even if they never worked on actual navigable waters. In this context, the Court emphasized that the phrase "maritime employment" in Section 2(3) of the Act has an occupational content and does not incorporate an additional requirement that some portion of the worker's duties be performed afloat. 444 U.S. at 78-81.[13] The Court therefore

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[13] The argument advanced by the employer in *Ford* was that "the 1972 Act covers *only* workers who are working or who may be assigned to work over the water itself." 444 U.S. at 77 (emphasis added). This construction of "maritime employment" would have resulted in a geographic limitation narrower than the one contained in the Act's situs provision, 33 U.S.C. 903(a), and it was therefore rejected by the Court. 444 U.S. at 78. The mere inclusion of employment on the water within the category of "maritime employment," however, does not create a limitation on the Act's coverage narrower than that contained in 33 U.S.C. 903(a), but rather furthers the remedial purposes of the 1972 amendments. See *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 268 (Act is to be liberally construed with "an expansive view of [its] extended coverage").

held that two marine terminal workers who transferred cargo between sea and land transportation were engaged in maritime employment by virtue of the very nature of their work, even though they were never required to perform any tasks on actual navigable waters.

The Second Circuit in *Fusco II* correctly reasoned that work afloat is not a necessary precondition to a finding of "maritime employment" under the amended Act. But it went too far in concluding that the location of a person's work is irrelevant to the resolution of the "maritime employment" issue. There is no intimation in this Court's opinion in *Ford* that a person who works on actual navigable waters must demonstrate that his work "bear[s] a significant relationship to navigation or to commerce on navigable waters" (*Fusco II*, *supra*, 622 F.2d at 1113) before he will be deemed to be "engaged in maritime employment" (33 U.S.C. 902(3)). The Court in *Ford* had no occasion to address that issue because it was not germane to the claimants whose coverage under the Act was then in dispute.

The very concept of "maritime employment" has an innate geographical link to navigable waters. By its nature, the term "maritime employment," which includes (among others) all "harborworkers," has both an occupational and a geographical context. The Court's decision in *Ford* was not intended to exclude the latter in favor of the former.[14] As the Fifth Circuit recently concluded, "though [*Ford*] clearly stated that the status requirement 'focuses upon the nature, not the location, of employment,' 100 S. Ct. at 337, [*Ford*] did not forbid a consideration of location to determine whether an activity is maritime commerce." *Pippen* v. *Shell Oil Corp.*, 661 F.2d 378, 384 n.9 (1981). Thus, in *Pippen*, the Fifth Circuit

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[14] The *Ford* opinion itself made indirect use of the fact that the activities in question in that case took place alongside navigable waters. The Court noted that both claimants were engaged in "transferring goods between ship and land transportation." 444 U.S. at 81.

found coverage under the LHWCA for a wireline operator working on a vessel used to drill gas wells. The court explicity noted that "[t]o reach this conclusion, of course, we must to some extent look to location. Whereas onshore drilling and production cannot be considered maritime commerce, offshore drilling and production can be considered maritime commerce *because of its location.*" *Ibid.* (emphasis added).

This Court's decision in *Ford* established that in setting the scope of maritime employment "the crucial factor is the nature of the activit[ies] to which a worker may be assigned." 444 U.S. at 82. The Court did not, however, mandate that the location of those activities over navigable waters is irrelevant to a determination of their nature. And there is perhaps no other factor quite as salient in the determination of the maritime nature of any activity as the fact that it actually takes place upon navigable waters.

3. ***Adoption of a "navigation or commerce" test would frustrate Congress' intent to provide a sure and effective compensation remedy for all injuries sustained on navigable waters***

As discussed above (see pages 15-18, *supra*), this Court disposed of the "maritime-but-local" exception to federal coverage under the 1927 Act largely because the vague and uncertain contours of the doctrine hopelessly muddled the jurisdictional reach of the LHWCA for workers injured on actual navigable waters. To ensure that injured workers had a sure and effective compensation remedy, this Court softened the jurisdictional boundary between state and federal remedies by extending federal coverage to all injuries occurring on navigable waters, regardless of whether a particular employment lacked a "significant" or "direct" relationship to navigation or commerce and was therefore within the reach of state law. The decision below, however, ignores the lessons of history by seizing upon the old "navigation or commerce" test utilized under

the discredited "maritime-but-local" doctrine, "thereby resurrecting the jurisdicitional monstrosity that existed before the clarifying opinions in *Davis* and *Calbeck*." *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 720.[15]

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[15] The "significant relationship to navigation or commerce" test adopted by the court below was first used under the amended Act by the Ninth Circuit in *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (1975), cert. denied, 429 U.S. 868 (1976). See *Fusco II*, *supra*, 622 F.2d at 1113. In determining whether the amended Act extended coverage to a worker injured while sorting logs on actual navigable waters, the Ninth Circuit in *Gilmore* declined to look to *Calbeck* and other pre-1972 cases in interpreting "maritime employment." The court, instead, chose to "relegate those decisions to limbo because * * * the 1972 amendments radically changed the basis" of federal coverage. 528 F.2d at 960. The Ninth Circuit therefore denied coverage to a worker who would have been covered under this Court's decisions in *Davis* v. *Department of Labor*, *supra*, and *Calbeck* v. *Travelers Insurance Co.*, *supra*, because his work lacked a "significant relationship to navigation or commerce."

As sole authority for its use of the "navigation or commerce" test, the Ninth Circuit cited (528 F.2d at 961) *Executive Jet Aviation, Inc* v. *City of Cleveland*, 409 U.S. 249 (1972). *Executive Jet*, however, is totally inapposite to claims under the LHWCA. 1A *Benedict on Admiralty* § 17, at 2-6 n.6 (7th ed. 1981). That case held that federal admiralty jurisdiction did not extend to tort claims arising from a crash of an airplane into navigable waters on a flight that would have been almost entirely over land, because there was no significant relationship to traditional maritime activity involving navigation and commerce. 409 U.S. at 272. As the Third Circuit has observed, "the language of Justice Stewart's opinion [in *Executive Jet*] was strictly limited to accidents involving aircraft * * *." *Edynak* v. *Atlantic Shipping Inc.*, 562 F.2d 215, 220 (1977), cert. denied, 434 U.S. 1034 (1978). See 409 U.S. at 265, 267-268, 271-272, 274. The Court emphasized that the fact that the plane crashed into navigable waters was "wholly fortuitous." 409 U.S. at 266. Moreover, the Court carefully noted that its decision was reached "in the absence of legislation to the contrary" and that any applicable federal statute establishing a contrary principle would control. 409 U.S. at 274 & n.26.

Marine construction workers, of course, are not "fortuitously" located on the water, but are required by the nature of their jobs to work on the water. The LHWCA, furthermore, is applicable federal law that controls the resolution of this case. The question

The underlying purpose of the LHWCA is to provide maritime workers with sure, certain access to a compensation remedy. See *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 720; *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 124; *Davis* v. *Department of Labor, supra*, 317 U.S. at 254. The court of appeals' denial of federal coverage for work afloat unless a worker can show a "significant relationship to navigation or commerce" negates that central mission of the Act by creating two discrete jurisdictional spheres for injuries occurring upon actual navigable waters. If a particular employment on the water lacks a significant relationship to navigation or commerce, it is labelled "not maritime" and placed within the exclusive jurisdiction of state workers' compensation remedies. If, on the other hand, the employment has such a relationship, it falls within the federal domain—and at some point may not, because of *Southern Pacific Co.* v. *Jensen, supra*, 244 U.S. at 216, be reached by state workers' compensation remedies.[16] Thus, under the court of appeals' approach, workers injured on actual navigable waters are faced with a choice between two discrete remedies, state or federal, and should they stumble in their selection the "price of error

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here is one of statutory construction: what did Congress intend by the term "maritime employment"? The history of the Act, discussed above, reveals that the term is not limited to matters deemed to have some direct relationship to navigation or commerce. Finally, the concern that the Court expressed in *Executive Jet* for state authority, which is generally displaced upon application of admiralty jurisdiction, has no relevance here. See 409 U.S. at 272-273. Coverage under the LHWCA is not exclusive of state law, but rather is concurrent and supplemental to the constitutional reach of local workers' compensation law. See *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 722.

[16] The *Jensen* decision retains vitality, and it is clear that at some point federal authority over maritime work becomes exclusive. *Askew* v. *American Waterways Operators*, 411 U.S. 325, 344 (1973); *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272, 273 (1959).

[is] unnecessary expense and possible foreclosures from the proper forum by statute of limitations." *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 718, citing *Davis* v. *Department of Labor, supra*, 317 U.S. at 254.

Workers injured on land do not face the same draconian choice confronting workers afloat. Following this Court's decision in *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 722, all injuries occurring upon the newly enlarged situs of the 1972 Act landward of the *Jensen* line are presumptively covered by state workers' compensation remedies.[17] Thus, a land-based worker does not face an "either/or" choice: he is assured of a state remedy and can obtain supplemental federal coverage upon a proper showing of "maritime employment."

The "horns of the jurisdictional dilemma" (*Davis* v. *Department of Labor, supra*, 317 U.S. at 255) created by the court of appeals' approach therefore press exclusively on workers injured upon actual navigable waters—the group of workers the LHWCA originally was enacted to benefit. This Court should not construe the 1972 amendments, which were specifically designed by Congress to extend rather than to withdraw federal coverage, as mandating such an implausible and inequitable result. The 1972 Act is remedial legislation, and its "maritime

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[17] In *Sun Ship, Inc.* v. *Pennsylvania, supra*, this Court endorsed the continuing validity of the *Davis* and *Calbeck* decisions and specifically found concurrent state and federal jurisdiction over land-based injuries occurring on the newly enlarged situs of the amended Act. The Court rejected the claim that the 1972 amendments displaced state jurisdiction of land-based injuries, because a mutually exclusive regime of federal and state jurisdiction over land would present the same "jurisdictional dilemma" that was found to be unacceptable over water under the 1927 Act. 447 U.S. at 720. Absent legislative history to "suggest a congressional decision to exclude state laws from the terrain newly occupied by the post-1972 Longshoremen's Act" (*id.* at 721), this Court declined to revert to "two mutually exclusive remedial systems" that would " 'defeat the purpose of the federal act' " by depriving workers of " 'sure and certain relief' " (*id.* at 720, quoting *Davis* v. *Department of Labor, supra*, 317 U.S. at 254).

employment" requirement " 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' " *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 268, quoting *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

Whatever the scope of "maritime employment" when work takes place entirely upon land, the term historically has been construed to include all work performed upon actual navigable waters. See, *e.g.*, *Pennsylvania R.R.* v. *O'Rourke*, *supra*, 344 U.S. at 339-340 (railroad work is "maritime" when done on navigable waters); *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U.S. 135, 137 (1928) (logging work is "maritime," although also local in character, when it is done on navigable waters). There is every reason to retain this classical construction of "maritime employment" under the 1972 amendments for injuries occurring on actual navigable waters. This construction is faithful to the express congressional intent to retain coverage under the amendments for workers that were "traditionally covered" (S. Rep. No. 92-1125, *supra*, at 16) and accords with the historic and common sense meaning of "maritime employment." See generally G. Gilmore & C. Black, *The Law of Admiralty* 428-430 (2d ed. 1975); 1A *Benedict on Admiralty* 517 (7th ed. 1973) (quoted in *Fusco I*, *supra*, 601 F.2d at 663 n.3); Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 694 (1973). Perhaps most important, this approach avoids the hair-splitting distinctions regarding whether a particular activity has a "significant" relationship to navigation or commerce that proliferated under the "maritime-but-local" doctrine. See, *e.g.*, *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 119, 124-125. See also G. Gilmore & C. Black, *The Law of Admiralty*, *supra*, at 430.

The "navigation or commerce" test for "maritime employment," moreover, is not a principled and rational means of limiting LHWCA coverage to workers who are "truly" maritime. Under the court of appeals' approach,

a court resolving a LHWCA coverage question does not look to the conditions of employment or the maritime hazards confronting, for example, a marine construction worker. Rather, the court looks to the ultimate use or purpose of the facility under construction to determine whether it—not the worker or his activities—possesses some relationship to traditional maritime concepts. This is hardly a logical method of testing for coverage under the Act.

Under the court of appeals' analysis, marine construction workers presumably are covered when building a pier, wharf, or other facility viewed as having some "direct" relationship to navigation or commerce. Workers like Churchill, however, who are injured while building a water pollution control project, are denied coverage—even though they are exposed to the same conditions and hazards of marine employment as their more "directly connected" colleagues. This reasoning leads to the same irrational, doctrinaire results that prevailed under the "maritime-but-local" rule, when workers building new ships were accorded state workers' compensation benefits while workers repairing old ships were denied them. See *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922).[18] The LHWCA was designed by Congress to provide a workers' compensation remedy for all injuries "where *Jensen* might have seemed to preclude state compensation." *Calbeck* v. *Travelers Insurance Co.*, *supra*, 370 U.S. at 120-121. The Act was not designed as a general aid to navigation and commerce. It therefore makes

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[18] Indeed, the "navigation or commerce" test has led to differing results in LHWCA claims arising from the same construction project involved in this case. The Benefits Review Board and the Second Circuit found coverage under the amended Act for a worker who was injured while building a dock at the North River Pollution Control Project. *Matson* v. *Perini North River Associates*, 9 B.R.B.S. 967 (1979), aff'd mem., 661 F.2d 910 (2d Cir. 1981). Since the dock would be used to load processed sludge aboard vessels for disposal at sea, this construction worker, unlike respondent Churchill, was held to be engaged in maritime commerce.

little sense to restrict the coverage of the Act solely to employment bearing a substantial relationship to those activities, in derogation of the fundamental congressional purpose to extend a "uniform compensation statute" to "hardworking men, engaged in a somewhat hazardous employment" upon navigable waters. S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926), quoted in *Calbeck* v. *Traveler's Insurance Co., supra*, 370 U.S. at 121.

Rather than become embroiled in formalistic inquiries as to whether a particular activity on the water is more or less related to maritime commerce, this Court should embrace the logical and realistic view that employment on the water is by definition "maritime employment." The ultimate use of a facility under construction on navigable waters has no bearing on the basic maritime nature of the construction activities themselves.[19] The original 1927 Act was "designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters" (*Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 124), and the 1972 amendments do not retreat from this fundamental purpose of the Act. A holding that workers injured upon actual navigable waters are necessarily engaged in "maritime employment" is essential "to avoid uncertainty as to the source, state or federal, of that remedy." *Ibid.*

This Court's unwillingness in *Sun Ship* to impose a regime of mutually exclusive federal and state jurisdiction over land-based injuries should be equally dispositive of the present litigation. To paraphrase the Court's decision in *Sun Ship*, the jurisdictional dilemma "that

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[19] Inquiries into the ultimate use of a facility are arguably appropriate only when considering whether *shoreside* construction workers are covered by the Act. Such workers are always at least one step removed from the sea, but may nonetheless be covered as "harborworkers" if their work is linked to the sea by virtue of the intended use of the facility under construction. 33 U.S.C. 902(3). See *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F.2d 750 (5th Cir. 1981), cert. denied, No. 81-693 (Jan. 11, 1982), and authorities cited therein.

results when employees must claim relief under one of two mutually exclusive compensation schemes is as acute when the jurisdictional boundary between schemes is [drawn between two maritime spheres], as when the line is [fixed upon land]." 447 U.S. at 720. The decisions in *Davis* and *Calbeck*, which were explicitly reaffirmed in *Sun Ship* inasmuch as Congress had expressed "no intimation of intent to overrule" them (447 U.S. at 722), settled once and for all that federal coverage under the LHWCA extends to *all* injuries occurring on actual navigable waters, regardless of whether a particular employment lacks a significant relationship to navigation and commerce and is therefore also within the reach of state workers' compensation laws. The 1972 amendments to the LHWCA should not be construed so as to revive the problematic "maritime-but-local" rule that wrought jurisdictional havoc under the 1927 Act. Here, as in *Sun Ship, Inc.* v. *Pennsylvania*, *supra*, 447 U.S. at 725-726, an "exclusivity rule" that would prohibit concurrent federal and state jurisdiction any time state coverage can be constitutionally extended to injuries on the water

> would thrust employees into the same jurisdictional peril from which they were rescued by *Davis* and *Calbeck* v. *Travelers Insurance Co.* [Citations and footnote omitted.] The legislative policy animating the LHWCA's landward shift was remedial; the amendments' framers acted out of solicitude for the workers. [Citations omitted.] To adopt [the exclusivity rule], then, would blunt the thrust of the 1972 amendments, and frustrate Congress' intent to aid injured maritime laborers.

4. *Denial of LHWCA coverage to some workers injured on actual navigable waters would result in unacceptable difficulty in administering the LHWCA*

This Court finally rejected the first incarnation of the "navigation or commerce" test in *Davis* and *Calbeck* largely because, after years of litigation, the area of

"local concern" with no direct relationship to navigation or commerce remained "undefined and undefinable." *Davis* v. *Department of Labor, supra*, 317 U.S. at 253. The court of appeals' reincarnation of the "navigation or commerce" test under the 1972 amendments presents the same debilitating ambiguity. The amorphous and elastic nature of the test, if it is approved by this Court, will create substantial uncertainty and difficulty in administering the LHWCA and will inevitably result in a large increase in generally unproductive litigation. Attempts by appellate courts to state the outer limits of the "navigation or commerce" test, moreover, will almost certainly be doomed to failure because, as this Court has already noted, "[t]here has never been any method of staking [those limits] out except in litigation in particular cases." *Calbeck* v. *Travelers Insurance Co., supra*, 379 U.S. at 125.

The disparity of results possible under the "navigation or commerce" test has already led to numerous conflicts between and within the federal courts and the administrative tribunals of the Department of Labor. For example, the Fifth Circuit has found coverage under the "navigation or commerce" test for a worker performing a job virtually identical to that of respondent Churchill. In *Gilliam* v. *Wiley N. Jackson Co.*, 659 F.2d 54 (5th Cir. 1981), petition for cert. pending, No. 81-1039, a worker on a bridge construction project was injured while standing on a supply barge supervising the transfer of pilings from the barge onto the shore. The court found coverage because the claimant was unloading cargo (the pilings) from a vessel. This, the court said, was longshore work and "it follows *a fortiori* that [the] work had a realistically significant relationship to maritime activities involving navigation and commerce." *Id.* at 58. The court below, however, denied coverage to respondent Churchill, even though he also was injured on a barge while unloading caissons from a supply vessel.[20]

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[20] The Director argued below, in part, that Churchill was covered because his duties included the unloading of caissons and

Holcomb v. *Robert W. Kirk & Associates, Inc., supra*, manifests similar confusion. There, the Benefits Review Board applied the "navigation or commerce" test to deny coverage to a vessel watchman, 11 B.R.B.S. 835 (1980), but the Fifth Circuit reversed, using the same test. *Holcomb*, moreover, dramatically illustrates the "jurisdictional peril" (*Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 725) posed by the "navigation or commerce" test. The injured employee in *Holcomb* first pursued a claim for workers' compensation benefits under Florida law, which was denied by state compensation authorities on the ground that the injury fell within the coverage of the federal Act. 655 F.2d at 590. His subsequent claim under the LHWCA was in turn denied by an ALJ and the Benefits Review Board on the ground that his employment did not meet the "navigation or commerce" test. Only the Fifth Circuit's willingness to find coverage under the "navigation or commerce" test for this particular injury on actual navigable waters prevented Holcomb from being denied both state and federal compensation remedies.

Disparate results under the "navigation or commerce" test have arisen not only among different courts, but also in connection with the same construction project—and even in cases decided by the same judge. The Benefits Review Board and Second Circuit recently distinguished the decision below and found coverage for a marine construction worker injured on the sewage treatment plant project involved here. *Matson* v. *Perini North River Associates, supra.* These results followed because, unlike Churchill (who was working on the sewage treatment plant's substructure), the worker in *Matson* was working on a dock that would be used to

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other materials from a supply barge. Although the Second Circuit did not specifically address this issue, it rejected a similar argument in *Fusco II*: "Longshoremen do not unload barges used in connection with [marine] construction." 622 F.2d at 1113. See also Pet. App. 4a.

load vessels with processed sludge.[21] The Chief Judge of the Benefits Review Board, who authored the opinion in which the Board first adopted the "navigation or commerce" test,[22] has also experienced difficulty reaching consistent results with identical factual situations under the "navigation or commerce" test. Although the judge joined in the decision denying coverage to the vessel watchman in *Holcomb* v. *Robert W. Kirk & Associates, Inc., supra*, 11 B.R.B.S. at 841, he had earlier found coverage for a similar worker because "it has been established for many years that a watchman aboard a vessel is a maritime employee." *McGrath* v. *E.J. Ring Detective Agency, Inc.*, No. 74-LHCA-245 (Oct. 4, 1974), slip op. 6.[23]

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[21] Each of the Board's three members filed a separate opinion: one found coverage under the "navigation or commerce" test, one concurred on the basis that all marine construction workers are covered, and one would have denied coverage under the "navigation or commerce" test. 9 B.R.B.S. 967 (1979). The Second Circuit summarily affirmed. 661 F.2d 910 (1981).

[22] *Sedmak* v. *Perini North River Associates*, 9 B.R.B.S. 378 (1978), aff'd *sub nom. Fusco* v. *Perini North River Associates, supra.*

[23] In another case predating the "navigation or commerce" test, involving a commercial diver being trained to make underwater inspections of various structures, the same judge wrote:

> It would be an absurdity, without equal, to find that an engineer performing a highly specialized function as a marine diver, which required him to descend 30 to 40 feet beneath the navigable waters of the United States, is not maritime in nature.

Sharp v. *Pacific Gas & Electric Co.*, 2 B.R.B.S. (ALJ) 25, 32 (1975), aff'd, 2 B.R.B.S. 381 (1975). Nevertheless, as Chief Judge of the Benefits Review Board, the judge subsequently applied the "navigation or commerce" test to the work of another commercial diver working on an underwater sewer pipeline and held that "claimant's work as a commercial diver constructing a sewage pipeline did not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." *Brown* v. *Hydro-Dredge Corp.*, 13 B.R.B.S. 788, 791 (1981) (footnote omitted).

In sum, the "jurisdictional monstrosity that existed before * * * *Davis* and *Calbeck*" has rematerialized. *Sun Ship, Inc.* v. *Pennsylvania, supra*, 447 U.S. at 720. The decisions of the courts of appeals and the Benefits Review Board that attempt to apply the "navigation or commerce" test again reflect the confusion and uncertainty originally documented in *Davis* v. *Department of Labor, supra*, 317 U.S. at 253 & n.2. Unless the teachings of *Davis* and *Calbeck* are reaffirmed and the federal Act is held to encompass all work-related injuries occurring on actual navigable waters, the "navigation or commerce" test will continue to cause an overabundance of LHWCA coverage litigation. Coverage will once again have to be determined on a case by case basis. *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 126.

The Court should reject these unpalatable consequences. The 1972 amendments to the LHWCA are remedial and should be liberally construed. *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 268. The "navigation or commerce" test should not be applied so as to withdraw LHWCA coverage of injuries occurring on actual navigable waters. As the Court said of the "point of rest" theory rejected in *Caputo* (*id.* at 278-279): "A theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage" may not be used to deny recovery under the LHWCA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES AND HARTFORD ACCIDENT & INDEMNITY COMPANY,

Respondents,

-and-

RAYMOND CHURCHILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Director, Officer of Workers' Compensation Programs, United States Department of Labor, has standing to obtain review of the judgment of the United States Court of Appeals for the Second Circuit in the instant case.

2. Whether a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is a "maritime employee" within the meaning of §2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (1970 & Supp. V 1975).

TABLE OF CONTENTS

	Page
Questions Presented	ii
Statutory Provisions Involved	1
Statement	2
Summary of Argument	3
Argument:	
I. The Director, Office of Workers' Compensation Programs, United States Department of Labor, does not have standing to obtain review of the decision below	7
A. The Director fails to satisfy the standing requirement of Article III, Section 2 of the Constitution, since he has suffered no injury in fact	10
B. The Director fails to satisfy this Court's requirement that his interests fall within the zone of interests to be protected or regulated by the LHWCA	16
II. A worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is not a "maritime employee" within the meaning of §2(3) of the LHWCA	19

A. Not all workers who may have been covered prior to the 1972 amendments are automatically covered thereafter 21

B. The "maritime employment" test of §2(3) requires that an employee's work bear a realistically significant relationship to navigation and commerce over navigable waters 30

1. The LHWCA is premised upon admiralty jurisdiction which requires a connection between an employee and traditional maritime activity 30

2. The navigation and commerce test is consistent with judicial interpretations of "maritime employment" and with the Congressional purposes behind the LHWCA 33

3. Application of the navigation and commerce test to injuries occuring anywhere within the §3(a) situs will not result in difficulties in administering the LHWCA 40

Conclusion 42

TABLE OF AUTHORITIES

CASES:	Page
Allen v. Grand Cent. Aircraft Co., 347 U.S. 535 (1954)	9
Association of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970)	4,9,10,14,18
Atlantic Transport v. Imbrovek, 234 U.S. 52 (1914)	31
Baizley Iron Works v. Span, 281 U.S. 222 (1930)	22,35
Baker v. Carr, 369 U.S. 186 (1962)	4,8
Boudreaux v. American Workover, Inc., 664 F.2d 463 (5th Cir. 1981), *rehearing en banc granted*, No. 80-3287 (Jan. 11, 1982)	27,28
Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962)	5,17,24, 25,37,38
Central Engineering Co. v. Bassett, 42 F.Supp. 750 (S.D. Ill. 1941)	36
Churchill v. Perini North River Associates, 652 F.2d 255 (2d Cir. 1981), *cert. granted*, No. 81-897 (Feb. 22, 1982)	*passim*
Conti v. Norfolk & W. Ry., 566 F.2d 890 (4th Cir. 1977)	39
Cook v. Belden Concrete Products, Inc., 472 F.2d 999 (5th Cir. 1973), *cert. denied*, 414 U.S. 868 (1973)	29
Davis v. Dept. of Labor, 317 U.S. 249 (1942)	5,22,38
DeLovio v. Boit, 2 Gall 398, Fed. Cas. No. 3776 (1815)	22,30
Director, OWCP v. Alabama By-Products Co., 560 F.2d 710 (5th Cir. 1977)	13,14
Director, OWCP v. Boughman, 545 F.2d 210 (D.C. Cir. 1976)	15

Director, OWCP v. Donzi Marine, Inc., 586 F.2d 377 (5th Cir. 1978) 11,12,14

Director, OWCP v. Jacksonville Shipyards, Inc., 433 U.S. 904 (1977), *vacating and remanding Jacksonville Shipyards v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *aff'd on remand*, 575 F.2d 79 (1978), *cert. denied*, 440 U.S. 967 (1979) 7

Director, OWCP v. National Mines Corp., 554 F.2d 1267 (4th Cir. 1977) 13

Director, OWCP v. National Van Lines, Inc., 613 F.2d 972 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980) 14,15

Director, OWCP v. Newport News Shipbuilding and Dry Dock Co., 676 F.2d 110 (4th Cir. 1982) 14

Director, OWCP v. Peabody Coal Co., 554 F.2d 310 (7th Cir. 1977) 13

Director, OWCP v. Rasmussen, 436 U.S. 955 (1978), 440 U.S. 29 (1979), *affirming* 567 F.2d 1385 (9th Cir. 1978) 7

Director, OWCP v. Walter Tanzen, Inc., 446 U.S. 905 (1980), *vacating and remanding Walter Tanzen, Inc. v. Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), *rev'd on remand*, 624 F.2d 5 (1980) 7

Ednyak v. Atlantic Shipping, Inc., 562 F.2d 215 (3d Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) 31

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972) 31,32,33, 34,40

Foremost Ins. Co. v. Richardson, No. 80-2134 (June 23, 1982) 32,34,40

Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir. 1979), *vacated and remanded*, 444 U.S. 1028 (1980), *rev'd on remand*, 622 F.2d 1111 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) ..... *passim*

Gilliam v. Wiley M. Jackson Co., 659 F.2d 54 (5th Cir. Unit B 1981) 39
Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969) 31
Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922) 6,22,32
Hastings v. Mann, 226 F.Supp. 962 (E.D.N.C. 1964), *aff'd*, 340 F.2d 910 (4th Cir. 1965) 31
Holcomb v. Robert W. Kirk & Associates, Inc., 655 F.2d 589 (5th Cir. 1981) 39
Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981), *cert. denied*, No. 81-693 (Jan. 11, 1982) 40
I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), *modified en banc*, 542 F.2d 903 (4th Cir. 1976), *vacated and remanded sub nom. Adkins v. I.T.O. Corp. of Baltimore*, 433 U.S. 904 (1977), *rev'd on remand*, 563 F.2d 646 (4th Cir. 1977) 8,12
Jones v. Bender Welding & Mach. Works, Inc., 581 F.2d 1331 (9th Cir. 1978) 32
Karpovs v. State of Mississippi, 663 F.2d 640 (5th Cir. 1981) 32
Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976) 31
Lee v. Civil Aeronautics Board, 225 F.2d 950 (D.C. Cir. 1955) 17
LeMelle v. B.F. Diamond Construction Co., No. 81-1559 (4th Cir. May 25, 1982) 39
Linda R.S. v. Richard D., 410 U.S. 614 (1972) 16
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 16

Massman Const. Co. v. Bassett, 30 F.Supp. 813 (E.D. Miss. 1940), *rev'd*, 120 F.2d 230 (8th Cir. 1941), *cert. denied*, 314 U.S. 648 (1941) 35
McCord v. Cephas, 532 F.2d 1377 (D.C. Cir. 1976) 15
Morrissette v. United States, 342 U.S. 246 (1952) 9
Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) 22,30,33, 41
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-897

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.,

Respondents,

-and-

RAYMOND CHURCHILL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

STATUTORY PROVISIONS INVOLVED

1. Article III, §2 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

> under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §902(3) provides in relevant part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker***

STATEMENT

Respondent Perini North River Associates is a joint venture of construction enterprises which was awarded a contract by the City of New York to build the substructure for a sewage disposal plant. This substructure, covering roughly 30 acres, extended some 2,000 feet between West 135th and West 145th Streets in New York City, and about 700 feet from a bulkhead line near the water's edge out into the Hudson River. (Pet. App. D at 29a-30a).

The substructure was constructed by driving some 2,300 hollow circular pipes, or caissons, into the bedrock of the river by airhammer. The caissons were then filled with concrete and connected by beams. Precast concrete slabs were then placed on top of the beams, forming a platform. *Fusco v. Perini North River Associates*, 601

F.2d 659, 661 (2d Cir. 1979), *vacated and remanded,* 444 U.S. 1028, *rev'd on remand,* 622 F.2d 1111 (1980), *cert. denied,* 449 U.S. 1131 (1981).[1] Pet. App. D at 30a.

In his Decision and Order, the Hon. Julius A. Johnson, Administrative Law Judge, included the following Factual Findings:

> The caissons were delivered to the site by rail cars. With other materials, they would be placed on barges by cranes and tugs would move the barges to a point where other cranes would place them in the appropriate location for the work then underway.
>
> Claimant, a member of a dock builder's union, was a drill barge foreman who supervised the work for the driving and setting of caissons in the river bottom. On October 9, 1974 claimant was giving directions to a crane operator in the lifting of a 20-ton caisson which was to be placed in a position for hammering. When the caisson was lifted it drew taut a line attached to the bottom of the caisson to keep it from turning while suspended by the crane. The line snapped against the back of claimant's left leg, flipping him up in the air. Claimant sustained injuries to his left leg, thumb and head.

Pet. App. D. at 30a.

SUMMARY OF ARGUMENT

1. The Director, Office of Workers' Compensation Programs, United States Department of Labor, must satisfy the standing requirements of Article III, Section 2 of the United States Constitution, and judicially created limitations, in order to properly obtain review of the deci-

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[1]The description employed in *Fusco, supra,* was adopted by the Court below.

sion below. The Article III requirement has been interpreted as necessitating a "personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204 (1962), or an "injury in fact", *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152 (1970). The Director fails to satisfy this requirement, since he has suffered no "injury in fact" to any interest, pecuniary or administrative. He has no pecuniary interest in the outcome of this case, since no governmental funds are to be expended as a result of the Benefits Review Board and Court of Appeals decisions below.

Additionally, the Director has suffered no injury in fact to any administrative interest, as his ability to perform his general administrative duties under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter, the "LHWCA" or the "Act") remains unimpaired by the decisions below.

The Director also fails to satisfy this Court's requirement that the petitioner allege an interest which is arguably "within the zone of interests to be protected or regulated by the statute . . . in question." *Data Processing, supra* at 153. The Director is not an intended beneficiary of the LHWCA; nor does the Act reveal any interest on the part of the Director which was to be regulated by it.

2. The court of appeals properly denied coverage under the Act to a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected. The 1972 Amendments to Section 2(3) of the LHWCA defined those classes of employees for whom coverage was intended. Coverage was limited to those employees engaged in "maritime employment" upon the expanded situs set forth in §3(a). "The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the

'status' of the injured." *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264-65 (1977). The "status" requirement embodies an occupational concept that "focuses upon the nature, not the loclation, of employment." *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 79, 83 (1979).

By affirmatively describing the classes of workers in the §2(3) definition of "employee", Congress has withdrawn coverage from those individuals who otherwise might have been covered before 1972, solely by virtue of the situs of injury. *Calbeck v. Travelers Ins. Co.,* 370 U.S. 114 (1962). "The example [contained in the Committee Reports accompanying the LHWCA] also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered." *Northeast Marine Terminal Co. v. Caputo, supra,* 432 U.S. at 267.

Construction workers were not traditionally considered to be engaged in "maritime employment". *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334, 341 (1941). Nor were such workers traditionally covered under the 1927 LHWCA. *Davis v. Department of Labor,* 317 U.S. 249, 253 (1942). Prior to the 1972 amendments to the Act, to the extent that construction workers were afforded coverage, such coverage resulted from the strict situs rule set forth in *Calbeck v. Travelers Ins. Co., supra.* With the addition of the status requirement, some non-maritime employees within the Section 3(a) situs will lack coverage. The addition of the "status" test was not an expansion but rather a contraction. 4 Larson, *The Law of Workmen's Compensation,* §89.27 at 16-181 (1981).

Congress intended to apply a "simple uniform standard of coverage" applicable to all employees injured upon the §3(a) situs. *Pfeiffer, supra,* 444 U.S. at 83. Section 2(3) states, in relevant part, that "[w]hen used in this Act . . . [t]he term 'employee' means any person engaged

in maritime employment . . . ". This definition permits no license to distinguish among employees injured on any particular portion of the §3(a) situs.

The court of appeals correctly applied a "navigation or commerce" test of "maritime employment" to Churchill's work activities, as it would to any employee injured over the covered situs. The court properly declined to analyze coverage solely by resort to the situs of Churchill's injury. This analysis conforms with the mandate of this Court in *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979).

The LHWCA is premised upon admiralty jurisdiction which requires a nexus to traditional maritime activity. Originally the term "maritime employment" provided the classic test for jurisdiction over an employment contract: work having a direct relation to navigation and commerce. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 477 (1922).

By focusing upon those workers in the industry for which federal coverage was intended, the navigation and commerce" test is consistent with the purposes of the amended Act, the decisions rendered thereunder, and represents a rational basis for the exercise of federal jurisdiction, as the test itself constitutes the "clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee." *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 960 (9th Cir. 1976), *cert. denied,* 429 U.S. 868 (1976).

Application of the "navigation and commerce" test provides a clear and consistent standard for the administration of the LHWCA and directly serves the congressional intent to identify and compensate those employees whose occupations are historically associated with "maritime employment".

ARGUMENT

I. THE DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, DOES NOT HAVE STANDING TO OBTAIN REVIEW OF THE DECISION BELOW.

In order to properly obtain review of the decision below, the Director[2] must satisfy the standing requirements of Article III, Section 2 of the United States Constitution and judicially created limitations.[3]

With respect to the Constitutional standard, this Court stated that,

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[2]While the Act directs the Secretary of Labor to administer its provisions, 33 U.S.C. 939, this authority has been delegated to the Director. 20 C.F.R. 701.201.

[3]This Court has previously decided cases brought on the Director's petition for certiorari. *Director, OWCP v. Walter Tanzen, Inc.*, 446 U.S. 905 (1980), *vacating and remanding Walter Tanzen, Inc. v. Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), *rev'd on remand*, 624 F.2d 5 (1980); *Director, OWCP v. Rasmussen*, 436 U.S. 955 (1978), 440 U.S. 29 (1979), *affirming* 567 F.2d 1385 (9th Cir. 1978); *Director, OWCP v. Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), *vacating and remanding Jacksonville Shipyards v. Perdue*, 599 F.2d 533 (5th Cir. 1976), *aff'd on remand*, 575 F.2d 79 (1978), *cert. denied*, 440 U.S. 967 (1979). Although it appears that the Court concluded that the Director had standing in those cases, since a decision on the merits was rendered, the decisions themselves contained no reference to that issue.

In *Fusco v. Perini North River Associates*, 601 F.2d 659, *vacated and remanded on other grounds*, 444 U.S. 1028, *rev'd on remand on other grounds*, 622 F.2d 1111, *cert. denied*, 449 U.S. 1131, the Second Circuit held that the Director had no standing to petition for review. In the case at bar, the Director participated as respondent in the Court of Appeals, and argued in favor of the petition, obviously in recognition of that Circuit's position regarding his standing to seek review.

It is respectfully requested that the question of the Director's standing to unilaterally seek review in this Court be definitively examined at this time.

> . . . the standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [*Baker v. Carr*, 369 U.S. 186, 204 (1962)] as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (emphasis in original).

Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1975).

This constitutional standard—that a plaintiff have a "personal stake" in the outcome of a case—has been incorporated into the LHWCA via §21(c), which provides in pertinent part:

> Any person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain review of that order in the United States Court of Appeals for the Circuit in which the injury occurred, by filing . . . a written petition praying that the order be modified or set aside.

33 U.S.C. §921(c). *See ITO Corp. of Baltimore v. Benefits R. Bd., et al.*, 542 F.2d 903 (4th Cir. 1976), *vacated sub nom. Adkins v. ITO Corp. of Baltimore*, 433 U.S. 904, *rev'd on remand on other grounds*, 563 F.2d 646 (4th Cir. 1971).

Additionally, this Court has clearly interpreted the language "adversely affected or aggrieved" to include the constitutional standing requirement in cases brought under §10 of the Administrative Procedure Act, 5 U.S.C. §702 (hereinafter, the "APA"), which employs language nearly identical to that contained in §21(c).[4]

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[4]The APA provides, in relevant part, that "a person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C . §702.

[Footnote cont'd next page]

> In *Data Processing Service v. Camp*, 397 U.S. 150 (1969), this Court held the constitutional standing requirement under [§10 of the APA] . . . to be allegations which, if true, would establish that the plaintiff had been injured in fact by the action he sought to have reviewed.

Simon, supra at 38.

While §21(c) of the LHWCA does not specifically refer to standing before the Supreme Court of the United States, it is clear that the same standing requirements apply to all federal courts. *Simon, supra* at 38.[3]

General rules of statutory construction require that the meaning ascribed by this Court to the phrase "adversely affected or aggrieved" under the APA also be applied herein. "Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed to be used in the same sense." 2A C.D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION §51.02, at 290 (4th ed. 1973) (footnotes omitted). *See also Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 551 (1954) (holding that language in the Defense Production Act of 1950 should receive the same construction that was placed on similar language in the Stabilization Act of 1942).

Additionally, §21(c) of the LHWCA was passed six years after the enactment of §10 of the APA. It may be presumed that Congress was well aware of the judicial interpretations of §10 of the APA when it utilized an almost identical standing requirement in the LHWCA, and intended that these interpretations be applied to §21(c) of the LHWCA as well. 2A C.D. SANDS, *supra*, §51.02, at 290. *See also Morrissette v. U.S.*, 342 U.S. 246, 263 (1952) (where Congress defined various criminal offenses, it was presumed to "know[ ] and adopt [] the cluster of ideas that were attached to each borrowed [term]").

[3]The LHWCA provides no support for the proposition that Congress intended a different standing test to be applied, dependent upon the level of appellate review (i.e. Court of Appeals or Supreme Court). Section 21(c) certainly would not address itself to the standing of a party to seek review in the Supreme Court since it provides that petitions seeking review of Benefits Review Board decisions be taken to the appropriate Court of Appeals only. Congress had no need to address the question of standing with respect to further appellate review in §21(c) and did not do so.

Therefore, in order to obtain review in the Supreme Court, a party must be "adversely affected or aggrieved". Only respondent Churchill was aggrieved by the decision below, and he has chosen not to petition this Court for review.

In *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), this Court established a two prong test for determining standing under the "adversely affected or aggrieved" standard. First, pursuant to the previously mentioned Art. III "personal stake" requirement, a party must allege "injury in fact". *Id.*, at 152. Second, the "interest sought to be protected by the complainant [must] arguably [be] within the zone of interests to be protected or regulated by the statute . . . in question." *Id.*, at 153.

A. THE DIRECTOR FAILS TO SATISFY THE STANDING REQUIREMENT OF ARTICLE III, SECTION 2 OF THE CONSTITUTION, SINCE HE HAS SUFFERED NO INJURY IN FACT.

In order to satisfy the Article III "injury in fact" test, a party must allege a "concrete" injury, *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 233 (1974), that is "likely to be redressed by a favorable decision." *Simon, supra,* 426 U.S. at 38. As stated by this Court in *United States v. SCRAP,*

> Of course, pleadings must be something more than an ingenious exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.

412 U.S. 669, 688-89 (1973).

The Director has not suffered any injury in fact as a result of the decision below, since he has no interest, pecuniary or administrative, which has been adversely affected by that decision.

The issue of the Director's standing to seek review in cases arising out of the LHWCA has been discussed by various courts of appeals. In *Director, OWCP v. Donzi Marine, Inc.*, 586 F.2d 377 (5th Cir. 1978), the Court held that the Director did not have standing to petition for review. The Fifth Circuit found the Director to have no pecuniary interest in that, under the LHWCA's compensation scheme, no government funds would be disbursed as the result of the Board's decision. 586 F.2d at 380.

Similarly, the instant case involves no potential for governmental pecuniary liability. Any compensation payments to the claimant herein would be the sole responsibility of the employer and its insurance carrier. In the case at bar, as in *Donzi, supra,* no claim has been made which would implicate the Director's responsibilities regarding the special fund established under 33 U.S.C. §944.[6]

The Director's administrative responsibilities under the LHWCA are discussed in 33 U.S.C. §939(c), which states in relevant part that

> (c)(1) The Secretary shall, upon request, provide persons covered by this Act with information and assistance relating to the Act's coverage and compensation and the procedures for obtaining such compensation, including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this Act with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower and vocational rehabilitation services

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[6] *See infra* at p. 14.

> and assist such employees in obtaining the best such services available.

The decision below, denying coverage under the LHWCA, creates no greater administrative burdens for the Director, nor does it impair his ability to administer the Act.

While resolution of coverage issues presented in this case might permit the Director to give more certain information to potential claimants, such an interest would exist in virtually every case, and is not sufficiently particularized as to render him an "aggrieved party".

> [A] . . . mere "interest in a problem", no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA.

Sierra Club v. Morton, 405 U.S. 727, 739 (1972). "[T]he Director cannot claim to be aggrieved simply because the advice he must give is uncertain." *Donzi, supra* at 381-82. *See also Fusco, et al. v. Perini North River Associates, et al.,* 601 F.2d 659, 670 (2d Cir. 1979), *vacated and remanded on other grounds,* 444 U.S. 1028, *rev'd on remand,* 622 F.2d 1111, *cert. denied,* 449 U.S. 1131 (1981); *ITO Corp. of Baltimore v. Benefits R. Bd., supra* at 908 (§939(c) does "not confer upon the Director any specific interest in the proper administration of the Act" and therefore did not "provide the requisite stake"). *Contra, Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982).[7]

As the Fifth Circuit concluded in *Donzi,*

> [c]lose analysis of each category of responsibilities exposes no interest of the Director, either pecuniary or adminis-

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[7] *See* discussion at n. 12, *infra* and accompanying text, *infra.*

> trative, which is adversely affected by the Board's decision in this case.

586 F.2d at 380.

The Director has been found to have standing to seek review under §21(c) in certain cases. *See, e.g., Director, OWCP v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977); *Director, OWCP v. National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977); *Director, OWCP v. Alabama By-Products Co.*, 560 F.2d 710 (5th Cir. 1977). Those cases involve claims for benefits under the Federal Coal Mine Health and Safety Act (hereinafter, the "FCMHSA"), which provides through cross-reference that the compensation procedures of the LHWCA are applicable to claims against employers for Black Lung benefits. 30 U.S.C. §932(a) (1976).

In *Peabody Coal, supra,* the Seventh Circuit granted the Director standing, but specifically confined their holding to the "unique circumstances" of that case. *Id.* at 338. Specifically, the finding of standing was based on factors peculiar to the FCMHSA not present under the LHWCA. The most crucial of these factors were the potential for governmental liability, should the claimant prevail under the FCMHSA,[8] and the confusion as to which provisions of the LHWCA were to be applicable to Black Lung cases. As stated by the Fifth Circuit in *Alabama By-Products:*

> We hold only that under the unusual circumstances of this case, when an adverse determination would force the Director to expend resources to readjudicate many Black Lung claims, or when no final resolution would leave the administration of the transition phase of the program in a limbo of uncertainty, the Director's interests as ad-

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[8] 30 U.S.C. §921-22.

> ministrator of the Black Lung program are sufficiently bound up with the case at bar that he must be granted standing to appear as petitioner.

560 F.2d 710, 717.

In addition, the Director has been found to have standing as a petitioner under §21(c) in cases involving the special fund established under §44(a) of the Act. 33 U.S.C. §944(a). *See, e.g., Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982); *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980).[9] *Accord, Donzi, supra*, at 380 n. 12. These cases, like the Black Lung cases, involve the potential for governmental pecuniary liability.[10] The possibility of an unjustified disbursement from the fund and the Director's responsibility as administrator of that fund to protect against such an event provides the personal stake or injury in fact required by Article III. See *Newport News, supra* at 113-14. *See also Donzi, supra* at 380 n. 12.

In *Shahady v. Atlas Marble & Tile Co.*, 673 F.2d 479 (D.C. Cir. 1982), the District of Columbia Circuit Court of Appeals held that the Director is a proper *respondent* to all petitions for review of a Benefits Review Board deci-

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[9]While these decisions indicate that the Director's administrative responsibilities contributed to his personal stake in the outcome of the case, the involvement of the special fund renders such statements unnecessary to the decisions, and therefore, mere dicta.

[10]Under the Act, the fund cannot contain "money or property of the United States". 33 U.S.C. §944(a). However, "payments into the fund include fines levied and collected by the government, and a government loan . . . provided initial support." *Donzi, supra*, at 380 n. 12.

sion.[11] Additionally, the Court stated, in dicta, that the Director's "general supervisory and enforcement interest" is also sufficient to confer standing to petition for review.[12] *Id.*, at 483. The Court found the Director's participation to be mandated by 20 C.F.R. §802.410(b), which states:

> The Director, OWCP as designee of the Secretary of Labor responsible for the administration and enforcement of the [Act], shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings conducted pursuant to section 21(c) of the LHWCA.

This argument fails to resolve the issue of the Director's standing; rather, it begs the question. It is axiomatic that rights can be delegated only to the extent they are

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[11]Respondents agree that the Director should properly be a respondent in review proceedings under the LHWCA. In this capacity, the Director may join in the petitioner's argument, if he so chooses, or even refrain from taking a position. *See Shahady, supra* at 485. However, as a respondent, the Director can not unilaterally continue the appeals process where, as in the case at bar, neither the claimant nor the employer or carrier have chosen to seek further review. Standing to invoke a federal court's jurisdiction is reserved for those who satisfy the requirements of Article III and §21(c) of the LHWCA.

[12]The Court cites *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), as support for this proposition. However, as stated previously, that case involved potential special fund liability, thereby making it unnecessary for the Court to decide whether a general administrative interest alone would be sufficient to confer standing. Moreover, the D.C. Circuit in *National Van Lines* relied upon decisions in which the issue of the Director's standing to petition was never discussed. 613 F.2d at 977, n.6, citing *Director, OWCP v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976) and *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976).

The D.C. Circuit in *Shahady* also cites §939 of the Act as creating an administrative interest in the Director sufficient to confer standing. As stated above, the duties created by that section (requiring the Director to provide general information and assistance to claimants) are insufficient to render the Director adversely affected or aggrieved. *See* discussion at pp. 11-13, *supra*.

possessed by the delegator. Thus, the Court's reliance on 20 C.F.R. §802.410(b) is misplaced. As argued by respondents in *Shahady*, that regulation "does nothing more than clarify who is to represent the Secretary of Labor in appropriate circumstances, not to define those circumstances." 673 F.2d at 481.[13]

In the case at bar, unlike the Black Lung and special fund cases, the Director has suffered no injury in fact to any interest, either pecuniary or administrative, and therefore has no standing under Article III to obtain this Court's review of the decision below.

B. THE DIRECTOR FAILS TO SATISFY THIS COURT'S REQUIREMENT THAT HIS INTERESTS FALL WITHIN THE ZONE OF INTERESTS TO BE PROTECTED OR REGULATED BY THE LHWCA.

To satisfy the second half of the *Data Processing* test,[14] the Director must show that the interests he seeks to protect are "within the zone of interests to be protected or regulated by the statute . . . in question." 397 U.S. at 153. The function of this test has been said to allow "courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area." *Tax Analysts and Advocates v.*

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[13]Additionally, a regulation or statute can not confer standing in contravention of Article III. "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . ." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). A statute or regulation may create a right, the violation of which will confer standing upon the injured party. *Simon, supra*, 426 U.S. at 41, n. 22. *See also Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1972). However, without an injury in fact, the standing requirements of Article III are not met. *Simon, supra* at 38-39.

[14]*See supra* at p. 10.

Blumenthal, 566 F.2d 130, 140 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).

Congress has clearly identified those persons whose interests are to be protected by the LHWCA. The Act was originally enacted to compensate injured workers excluded from state compensation programs. *See Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962). In addition, the Act has been amended to protect the interests of shipowners by eliminating their liability to covered workers under the unseaworthiness doctrine. *See* H.R. REP. NO. 1441, 92d CONG., 2d SESS., *REPRINTED IN* [1972] U.S. CODE CONG. & AD. NEWS 4698, 4701-4705.

Close examination of the Act reveals no evidence of a "legislative mandate" to protect the interests of the Director. "The right to review of agency action is usually restricted to persons whom the agency regulates and affects adversely." *Lee v. Civil Aeronautics Board*, 225 F.2d 950, 951 (D.C. Cir. 1955) (citing former §10(a) of the APA, 5 U.S.C. §1009(a), which also contained the adversely affected or aggrieved standard); *Robinson v. Pottinger*, 376 F.Supp. 615, 618 (M.D. Ala. N.D. 1974). Nor does the statute confer any duty upon the Director to protect the interests of injured workers.[13] *Cf. Washington*

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[13]This Court has held "that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1974) (citations omitted).

Exceptions to this general rule have been made in certain limited situations, i.e. where the plaintiff has a close relationship to those whose rights he seeks to assert, *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976); or "where, as a result of the very litigation in question, the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself . . ." *United States v. Raines*, 362 U.S. 17, 22 (1960) (citations omitted).

It is respectfully submitted that the Director does not fall within any of these exceptions, and should not be permitted to assert the rights of injured workers, particularly where the claimant herein has chosen not to do so himself.

Utilities & Transportation Comm. v. FCC, 513 F.2d 1142 (9th Cir. 1975) (standing granted to agency required by statute to protect the interests of those it regulates). As stated above, the Director's only statutory responsibility toward potential claimants is to provide them with information and assistance in processing claims. 33 U.S.C. §939(c).[16]

In addition, the Director has no enforcement duties relative to the Act. *Cf. United States v. Federal Maritime Comm.*, 655 F.2d 247 (D.C. Cir. 1980) (Justice Department's duty to enforce antitrust laws sufficient to confer standing to challenge Commission's order granting exemption from such laws).

The Director's only interest herein is in furthering a different interpretation of the Act than that adopted by the court below and the Benefits Review Board. This general interest is not within the zone of interests protected or regulated by the LHWCA. Therefore, the Director fails to satisfy both prongs of the *Data Processing* test, and has no standing to seek this Court's review of the decision below.

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[16]Under this section and 20 CFR §702.136, the Director has the option of providing legal assistance to claimants where doing so would not conflict with the Director's own position.

II. A WORKER ENGAGED IN THE CONSTRUCTION OF A CEMENT SUBSTRUCTURE, UPON WHICH A SEWAGE TREATMENT PLANT WOULD ULTIMATELY BE ERECTED, IS NOT A "MARITIME EMPLOYEE" WITHIN THE MEANING OF §2(3) OF THE LHWCA.

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901. *et seq.* states in relevant part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . .

The issue raised in this case is whether a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is a "person engaged in maritime employment" within the meaning of §2(3) of the Act.

In the decision below, the Court of Appeals for the Second Circuit denied the petition for review on the ground that Churchill failed to satisfy the "maritime employment" test of §2(3) of the Act. Specifically, the court concluded "that each argument" [advanced by Churchill and the Director] is foreclosed by the decision of

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[17]The arguments raised by Churchill below were: (i) that "the claim would have been covered under the LHWCA before the 1972 Amendments, . . . (ii) the 1972 Amendments were not meant to remove pre-existing coverage, and (iii) *Sun Ship, Inc. v. Pennsylvania* [447 U.S. 715 (1980)] proves that pre-1972 cases allowing coverage for injuries on navigable waters are still good law." Pet. App. 4a.

this Court in *Fusco II.*"[18] (Pet.App. 6a). *Fusco II, supra,* involved the claims of two employees of respondent Perini North River Associates.

In *Fusco II,* the Second Circuit concluded, with regard to the "maritime employment" test of §2(3) of the Act, that

> . . . we read the opinion [of the Supreme Court in *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979)] as precluding any application of the LHWCA, as amended in 1972, to an employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

622 F.2d 1111, 1113 (1980). In reviewing the work activities of Perini North River Associates employees, the *Fusco II* court held:

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant.

622 F.2d at 1113.

The occupational status requirement adopted by the Second Circuit in *Fusco II,* and applied in the decision below, is consistent with the legislative intent underlying the 1972 amendments, the decisions of this Court interpreting such amendments and the plain meaning of the statute itself.

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[18] *Fusco v. Perini North River Assoc., et al.,* 622 F.2d 1111 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131 (1981).

A. NOT ALL WORKERS WHO MAY HAVE BEEN COVERED PRIOR TO THE 1972 AMENDMENTS ARE AUTOMATICALLY COVERED THEREAFTER.

In enacting the 1972 Amendments, Congress, for the first time, affirmatively defined the class of workers sought to be covered under the Act. By adding the "maritime employment" requirement to §2(3), Congress clearly chose an occupational test for coverage not present in the 1927 Act. "The 1972 Amendments thus changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264-5 (1977).

By describing the classes of workers contained in the §2(3) definition of "employee", Congress had indeed withdrawn coverage from those individuals who otherwise might have been covered under the 1927 Act solely by virtue of the situs of injury. The legislative history accompanying the 1972 amendments demonstrates that Congress did not intend that the Act cover all injuries within the situs area, but rather, was concerned solely with coverage for a specific class of workers.[19] "[The]

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[19] *See Northeast Marine Terminal Co. v. Caputo, supra,* 432 U.S. 249, 267. (". . . persons who are on the sites but are not engaged in the overall process of loading and unloading vessels are not covered.").

Petitioner cites language in S. Rep. No. 92-1125 to the effect that "[amended §2(3)] does not exclude other employees traditionally covered ***." Pet. Brief at 21. However, this statement does not support coverage for construction workers. They were not employees *traditionally* covered under the 1927 Act. To conclude otherwise, one must first be able to cite a general consensus among the courts that construction workers, as a class, were subject to the provisions of the Act.

[Footnote cont'd on following page.]

legislative history discusses workers solely in terms of what they are doing and never in terms of where they are working." *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 80 (1979) (footnote omitted).

In the debates preceding passage of the amendments in the House, Representative Steiger posed the following question and answer:

> *Q. The present law covers employees working on navigable waters. Do the amendments change the scope of coverage?*

This Court, however, has observed that with respect to construction workers, there is no such general consensus concerning coverage under the pre-1972 Act. In *Davis v. Department of Labor,* 317 U.S. 249, while holding that a construction worker was subject to state coverage, this Court noted that,

> This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must "be determined in view of surrounding circumstances as cases arise." *Baizley Iron Works v. Span,* 281 U.S. 222, 230. The determination of particular cases, of which there have been a great many, has become extremely difficult. It is fair to say that a number of cases can be cited both on behalf of and in opposition to recovery here.

317 U.S. at 253. *See also* cases cited in n. 2 therein.

Davis and the numerous cases cited therein mandate the conclusion that construction workers are most certainly not employees who were traditionally covered under the Act.

The only workers covered throughout the entire history of the Act have been those whose injuries occurred on navigable waters *and* who worked under maritime employment contracts. Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments,* 9 J. Mar. L. Com. 41 (1977). *See generally* Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts,* 45 S. Cal. L. Rev. 699 (1972). Maritime employment contracts are those for work having a direct relationship to navigation or commerce of the sea. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 466 (1921). *See also DeLovio v. Boit,* 7 Fed. Cas. 418, 444, No. 3776 (C.C.D. Mass 1815); *Nacirema Operating Co. v. Johnson,* 396 U.S. 212, 215 n. 7 (1969).

A. Yes. The present law's coverage is limited to employees working on navigable waters, including those working on dry docks. The amendments will extend coverage to wharfs, terminals, marine railways and other adjoining areas customarily used in building, repairing, loading, or unloading vessels. Also, the definition of "employee" is clarified by the amendments.

The latter change was made so that a determination of coverage can be made on the basis of the definition of "employee." Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered "employer." The expansion of coverage is intended to bring about a measure of compensation uniformity applicable to persons *customarily considered to be working in the business.* Thus, even if an employee does not happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harborworker, whether engaged in repairing a vessel or unloading it.

118 Cong. Rec. 36385, Part 27 (1972) (emphasis supplied).

While it is true that the Committee reports indicated that the intent of the amendments was "to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity", the report immediately goes on to identify the occupational class of workers involved.[30]

The much discussed "expansion" of the Act took place solely in connection with situs, i.e., the newly includ-

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[30] "To take a typical example, cargo, whether in break bulk or containerized form is typically unloaded from the ship and immediately to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area." S. Rep. No. 92-1125 p. 13 (1972); H.R. Rep. No. 92-1441, p. 11.

ed shore-side areas.[21] In 1927 Congress chose to define coverage in terms of "places";[22] in 1972 Congress chose to define coverage both in terms of an enlarged situs and in terms of specific kinds of work activities performed within that situs.[23] Where coverage attaches only to a specific subgroup (workers engaged in maritime employment) within a larger group (all workers located on the §3(a) situs), some individuals in that larger group will lack coverage.

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[21]Professor Larson, in his treatise on Workmen's Compensation Law, stated

> that the expansion of the Act took pace *solely* in the enlargement of "situs" covered. The addition of the "status" test is not an expansion but a contraction. This is necessarily so because before 1972, there was no requirement whatever that *this* employee be in maritime employment.

4 Larson, *The Law of Workmen's Compensation*, §89.27 at 16-181 (1982) (emphasis in original).

[22]In fact, until this Court's decision in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), considerable doubt existed as to whether location, in and of itself was a sufficient basis for federal coverage. *See* n. 19, *supra*. This Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), viewed as the impetus for the enactment of the LHWCA, relied both on situs *and* status. Indeed, this Court's discussion dealt less with the location of the injury, than with the cases' impact upon "freedom of navigation" and commerce. 244 U.S. at 217. *See also* Watson, *Broadened Coverage Under the LHWCA*, 33 La. L. Rev. 683, 684-85 (1973).

[23]*See* discussion in Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments*, 9 J. of Mar. L. & Comm. 33, 49 (1977). *See generally*, Note, *Coverage Under the LHWCA Amendments of 1972: Developing A Practical, Uniformly Applicable Interpretation of the Status Requirement*, 18 Wm. & Mary L. Rev. 555 (1977).

> The situs test of §3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. *Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment."* This section defines the Acts' occupational requirements.

P.C. Pfeiffer, supra, 444 U.S. at 78 (emphasis supplied).

Nowhere is the intent to extend coverage to a specific occupational class of workers more clearly expressed than in the language of the statute itself. Section 2(3) states in part, that "[w]hen used in this *Act* . . . [t]he term "employee" means any person engaged in maritime employment . . ." 33 U.S.C. §902(3) (emphasis supplied). This definition permits no license to distinguish among employees injured on any situs noted in §3(a). "To be eligible for compensation, a person must be an employee as defined by §2(3) who sustains injury on the situs defined by §3(a)." *Pfeiffer, supra* at 74. Congress intended to apply a simple, uniform standard of coverage. *Id.* at 83.

The argument has been advanced that employment upon navigable waters as defined in the 1927 Act satisfies the status test of "maritime employment" incorporated into the 1972 amendments. Pet. brief at 27-31. However, if an employee injured over navigable waters is to be considered eligible for benefits solely by virtue of the situs of injury,[24] two disparate tests of coverage result: one oc-

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[24]Coverage under the 1927 LHWCA was not initially construed as extending to all workers injured upon navigable waters as defined therein. It was only after this Court's decision in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), that this was effectively established.

cupational test for shoreside employees and another geographical analysis for employees injured over "navigable waters" as defined in the 1927 Act.

This geographical distinction creating two "maritime employment" tests pursuant to §2(3), was clearly renounced in *Pfeiffer, supra*:

> The use of the term "maritime employment" in Sec. 2(3), therefore, provides no support for the proposition that the statutory definition of an employee imparts a geographic limitation narrower than the one defined in Sec. 3(a)
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> • • •
>
> We decline the invitation to construe "maritime employment" so as to create two differing situs requirements in a single sentence. By understanding the term "maritime employment" to embody an occupational rather than a geographic concept, we give the two phrases in §2(4) distinct and consistent meanings.

444 U.S. at 78 (footnote omitted).[21]

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[21]The argument advanced by petitioners and rejected in *Pfeiffer, supra*, was that employment upon navigable waters was the sole definition of "maritime employment". However, the approach suggested by petitioner herein—that employment upon navigable waters is a subgroup of a larger, occupational "maritime employment"—is equally unsatisfactory. The statute clearly uses the phrases "maritime employment" and "navigable waters" as separate and discrete concepts. Congress was well aware of how to define a general term (maritime employment) with inclusive, illustrative examples. *Pfeiffer, supra* at 77, n. 7. Congress never included "navigable waters" in the examples of "maritime employment"; in fact, Congress separately defined "navigable waters" in §3(a) of the Act.

Assuming, *arguendo,* that respondent Churchill would have been covered under the 1927 Act, he must now satisfy the "maritime employment" test of §2(3)—a prerequisite to coverage not previously demanded of the particular claimant. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264 (1977).

In *Weyerhauser Co. v. Gilmore,* 528 F.2d 957 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976), the Court termed the assertion that anyone covered under the Act prior to the 1972 Amendments must be permitted to come within its protection subsequent to the Amendments, "an exercise in judicial legerdemain." 528 F.2d at 960-61.

In *Boudreaux v. American Workover, Inc.,* 664 F.2d 463, *rehearing en banc granted,* No. 80-3287 (Jan. 11, 1982), the Court of Appeals for the Fifth Circuit noted that while the oft-expressed "extension of coverage" language used in connection with the 1972 amendments might make it "possible to consider that the "status" portion of the test for workers on water is satisfied by the fact of their employment on water" this contention "would distort the statutory language, whatever Congress' intent, if the workers' presence on the water is fortuitous and otherwise unconnected with maritime employment." 664 F.2d 463, 467.[26] The Court went on to note that three cir-

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[26]The *Boudreaux* court stated in its opinion that "[t]he test [for] whether the employment is "maritime" for purposes of the LHWCA, . . . , is whether the employment activities bear a significant relationship to commerce on navigable waters." 664 F.2d. at 468. In its earlier decision in *Pippen v. Shell Oil Co.,* 661 F.2d 378 (5th Cir. 1981), the court criticized the reasoning of the District Court in *St. Julien v. Diamond M. Drilling,* 403 F. Supp. 1256 (E.D. La. 1975) that all workers covered under the Act prior to 1972 would also be covered after the 1972 amendments, stating that "[t]he Supreme Court's holding, in *Pfeiffer* has apparently disaffirmed that analysis." 661 F.2d 318, n. 7.

cuits, including the Fifth, have determined that "the mere fact of injury while working on water" is insufficient to confer coverage under the Act. 664 F.2d 463, 467 (citing *Fusco II, supra, Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979) and *Weyerhauser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 429 U.S. 868 (1976)).

One of the objections of the 1972 amendments to the LHWCA was to abolish the costly third-party suits brought against vessel owners under the seaworthiness doctrine. 33 U.S.C. §905(b). *See*: H.R. Rep. No. 1441, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code & Ad. News 4698, 4701-4705; *Northeast Marine Term. Co. v. Caputo*, 432 U.S. 249, 261-62 (1977). This cause of action, originally available to seamen, had been extended to longshoremen on the theory that their work resembled activities historically performed by seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99 (1946). *See also* G. Gilmore & C. L. Black, Jr., *The Law of Admiralty*, 440-41 (2d ed. 1975). In a later case, this Court permitted the vessel owner to cross-claim against a stevedoring company for indemnity where the longshoreman collected against the vessel for an injury in fact caused by the stevedoring company's breach of its obligation to stow the cargo properly and safely. *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956).

Petitioner appears to premise coverage under the LHWCA on the ground that Churchill might be entitled to maintain a seaworthiness action which would conflict with Congress' intent to eliminate third-party seaworthiness actions in the context of the LHWCA. Pet. Brief at 23.

Those persons engaged in the construction of a substructure of a building, such as Churchill, never had a right to sue a vessel in third party actions based upon the seaworthiness doctrine. This conclusion is mandated since, unlike longshoremen and seamen, Perini North

River Associates employees did not have occasion to work aboard vessels not owned, operated and controlled by their employers. There could be no direct seaworthiness action against the employer since §5 of the 1927 and 1972 LHWCA provides that the benefits under the Act shall be the exclusive remedy against the employer. These employees have given up no rights in return for increased federal compensation benefits. A finding of coverage in the instant case will not implement the congressional intent to break the *Sieracki-Ryan* circle of liability.

Additionally, considerable doubt exists regarding whether Churchill was injured upon a "vessel." Pursuant to this Court's decisions in *West v. United States,* 361 U.S. 118 (1959) and *Roper v. United States,* 368 U.S. 20 (1961), in order to sustain a seaworthiness action, the plaintiff must have been employed on a vessel in navigation. *See* Gilmore & Black, *supra,* at 333. Whether a floating work platform, such as the one upon which claimant was injured, is a vessel in navigation within the meaning of general admiralty law, is highly doubtful. *See, e.g., Cook v. Belden Concrete Products, Inc.,* 472 F.2d 999 (5th Cir. 1973), *cert. denied,* 414 U.S. 868 (floating construction platform without motive power but towed between the shore and deeper water held not to be a vessel for maritime jurisdictional purposes). *See also Powers v. Bethlehem Steel Corp.,* 477 F.2d 643 (1st Cir. 1973), *rehearing denied,* 483 F.2d 963 (1st Cir. 1973), *cert. denied,* 414 U.S. 856 (1973).

To hold that any employment over 1927 navigable waters is a sufficient basis for coverage would be to read §2(3) out of the Act. *Id.* at 79; *Weyerhauser Co. v. Gilmore, supra,* 528 F.2d at 961. This interpretation is contrary to the intent underlying the amendments to the Act, the decisions interpreting the amendments, and the language of the statute itself. Such legislative revision is most appropriately left to Congress.

B. THE "MARITIME EMPLOYMENT" TEST OF §2(3) REQUIRES THAT AN EMPLOYEE'S WORK BEAR A REALISTICALLY SIGNIFICANT RELATIONSHIP TO NAVIGATION AND COMMERCE OVER NAVIGABLE WATERS.

In the decision below the Second Circuit correctly held that the "maritime employment" test of §2(3) requires that an employee's work bear a significant relationship to navigation and commerce upon navigable waters. The phrase "maritime employment" has a historical connotation of activity relating to maritime commerce and navigation. Defining the term in this manner permits coverage tailored to that class of workers which Congress intended to compensate and in addition provides the jurisdictional basis upon which the LHWCA rests.

1. THE LHWCA IS PREMISED UPON ADMIRALTY JURISDICTION WHICH REQUIRES A CONNECTION BETWEEN AN EMPLOYEE AND TRADITIONAL MARITIME ACTIVITY.

The LHWCA, being a workers' compensation statute, derives from both contract and tort law.[27] Federal admiralty jurisdiction in contract has always required a nexus between the contract and traditional maritime activity. *DeLovio v. Boit*, 2 Gall 398, Fed. Cas. No. 3776 (1815). Admiralty jurisdiction in tort originally employed a situs based test. *Id.* However, this has been increasingly

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[27] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 n. 7; 1A *Benedict on Admiralty* §17 at 2-5. In *Sea-Land Serv. v. Dir. Office of Workers' Comp.*, 540 F.2d 629 the court indicated that the Act was based on Congress' power over maritime contracts. *Id.* at 635-36.

questioned over the years.[28] In 1914, Mr. Justice Hughes acknowledged the suggestion that "[t]he appropriate basis . . . of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; . . . " *Atlantic Transport v. Imbrovek,* 234 U.S. 52, 61 (1914). Lower courts have held that admiralty jurisdiction in tort requires a nexus to traditional maritime activity. *See: Provost v. Huber,* 594 F.2d 717 (8th Cir. 1979); *Shows v. Harber,* 575 F.2d 1253 (8th Cir. 1978); *Kelly v. United States,* 531 F.2d 1144 (2nd Cir. 1976); *Peytavin v. Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir. 1972); *Gowdy v. United States,* 412 F.2d 525 (6th Cir. 1969); *Hastings v. Mann,* 226 F.Supp. 962, 964-65 (E.D.N.C. 1964), *aff'd,* 340 F.2d 910 (4th Cir. 1965).

In 1972, the Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972), after noting that, despite the broad language of earlier cases, the Court had never explicitly ruled that situs was the sole test for admiralty tort jurisdiction, held an airplane crash over water to be outside such jurisdiction on the grounds that a sufficient nexus to traditional maritime activities involving navigation or commerce did not exist. Following *Executive Jet Aviation,* Gilmore & Black commented in their treatise that in view of the Court's decision "some definite maritime flavor" is now a prerequisite for admiralty tort jurisdiction. Gilmore & Black, *The Law of Admiralty,* § 1-10 at 31, n.98(d). *Accord, Ednyak v. Atlantic,* 562 F.2d 215 (3rd Cir. 1977). They go on to state:

> Whether a given inclusion within or exclusion from the [tort] jurisdiction is warranted must depend on the general

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[28] *See:* Hough, *Admiralty Jurisdiction—Of Late Years,* 37 Harv. L. Rev. 529, 531 (1924); Black, *Admiralty Jurisdiction: Critique and Suggestions,* 50 Col. L. Rev. 259, 264 (1950); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969) at 233; 7 AJ. Moore, *Federal Practice,* Admiralty, paras. .325(3) and .325(5) (2d ed. 1972); Gilmore & Black, *The Law of Admiralty,* Sec. 1-10 at 30-31 (2d ed. 1975).

> sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the maritime industry . . . Ideally, the jurisdiction out [sic] to include those and only those things principally connected with maritime transportation.

Gilmore & Black, *supra*, §1-10 at 30-31.

The *Executive Jet* test for admiralty tort jurisdiction has been applied by lower courts. *Matter of Oswego Barge Corp.*, 664 F.2d 327, 334 (2d Cir. 1981); *White v. Johns-Manville Corp.*, 662 F.2d 234, 239 (4th Cir. 1981), *cert. denied*, —U.S.—, 102 S.Ct. 1037 (1982); *Karpovs v. State of Miss.*, 663 F.2d 640, 648 (5th Cir. 1981); *Sohyde Drilling & Marine v. Coastal State Gas Prod.*, 644 F.2d 1132, 1136 (5th Cir. 1981), *cert. denied*, —U.S.—, 1025 S.Ct. 635 (1981); *Jones v. Bender Welding & Mach. Works, Inc.*, 581 F.2d 1337 (9th Cir. 1978). This Court has recently affirmed that the *Executive Jet* test applies to admiralty torts generally. *Foremost Insurance Co. v. Richardson*, No. 80-2134, slip op. at 6 (June 23, 1982).

Logically then, in order to bring claims under the admiralty-based jurisdiction of the Act, there must be a connection between the event and traditional maritime activity. The history of both the phrase "maritime employment", and the Act itself, supports this proposition. Originally the term "maritime employment" provided the classic test for jurisdiction over an employment contract: work having a direct relation to navigation and commerce. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 477 (1922). In the first Supreme Court decision interpreting the Act, Chief Justice Hughes stated for a unanimous Court, "[t]he general scheme of the . . . Act was to pro-

vide compensation to employees engaged in maritime employment . . . " *Nogueira v. New York, N.H. & H.R.R.*, 281 U.S. 128, 131 (1930). Because the Act, as a workers' compensation statute contained elements of both tort and contract, some confusion may have existed as to whether locality alone would suffice to confer power on the federal courts to hear claims under the Act. In view of the increasing trend towards rationalizing the tort jurisdiction with that of contract, as demonstrated by *Executive Jet Aviation* and authorities cited, *supra*, there can be little doubt that under the 1972 amendments an inquiry into the nature of claimants' work and its relationship to traditional maritime activity is required, particularly when the text of the statute itself provides for such an inquiry in the classic terms of admiralty law. *Accord, Weyerhauser v. Gilmore*, 528 F.2d 957, 960-61 (9th Cir. 1975), *cert. denied* 429 U.S. 868 (1976).

2. THE NAVIGATION AND COMMERCE TEST IS CONSISTENT WITH JUDICIAL INTERPRETATIONS OF "MARITIME EMPLOYMENT" AND WITH THE CONGRESSIONAL PURPOSES BEHIND THE LHWCA.

As previously discussed,[29] the 1972 Amendments evidence a congressional intent to protect specific workers whose employment relates to the navigation, business or commerce of the sea.[30] The inclusion of the phrase

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[29]See pp. 21-25, *supra*.

[30]In *Nacerima Operating Co. v. Johnson*, 396 U.S. 212, 215 (n. 7) this Court had suggested that Congress could employ a status-oriented approach to coverage by exercising its power over maritime contracts.

"maritime employment" in §2(3), along with its historical connotation,[31] gives a clear indication of which workers Congress intended to protect. The judicial interpretations of "maritime employment", requiring a nexus between an employee's work and traditional maritime activities involving navigation or commerce over navigable waters, serve the congressional purpose and provide a rational basis for the exercise of federal power.[32] Additionally, the "navigation or commerce" test is sufficiently broad to include all employments related to this area of concern so as to implement the liberal construction of the Act in conformance with its purposes mandated in *Voris v. Eikel,* 346 U.S. 328, 333 (1953).

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[31]See pp. 35-37, *infra.*

[32]See pp. 30-33, *supra.* There is nothing inherently federal about water, navigable or not. It is the act of navigation on water and the development of commerce on water which the federal government has reserved to itself the right to protect and is best qualified to protect. *Executive Jet, supra; Foremost Ins. Co. v. Richardson, et al.,* No. 80-2134 (June 23, 1982). Thus, while it is correct to state that "[t]he very concept of "maritime employment" has an innate geographical link to navigable waters", Pet. Brief at 30, this analysis is incomplete. As the Fifth Circuit recently stated "[*P.C. Pfeiffer v. Ford*] did not forbid a consideration of location to determine whether an activity is maritime commerce." *Pippen v. Shell Oil Co.,* 661 F.2d 378, 384 n. 9. The crux of the opinion, however, is that maritime *commerce* is involved. See n. , supra. The *Pippen* opinion in no way supports the proposition that *any* employment over the water supports coverage. *See also Weyerhauser v. Gilmore,* 528 F.2d 957, 960-62, (9th Cir. 1975), *cert. denied* 429 U.S. 868 (1976).

Commentators have clearly distinguished between employment on navigable waters and "maritime employment". *See* Watson, *Broadened Coverage Under the LHWCA,* 33 La L. Rev. 683, n. 12; Morton, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage Under the 1972 Amendments,* 9 J. of Mar. L. & Comm. 33, 40 ("Maritime employment connotes a type of work done, rather than work that is done in a particular place."); 4 Larson, *The Law of Workmen's Compensation* §89.41 at 16-215 (1982).

Moreover, the "navigation or commerce" test had a settled meaning within the context of the Act prior to 1972. The 1927 Act, in addition to requiring an injury over "navigable waters" as then defined in Sec. 3(a), required that an employer have at least one employee engaged in "maritime employment". *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 264. The only reference to "maritime employment" in the 1927 Act was found in §2(4)."[33]

Those courts that addressed the issue of "maritime employment" followed the admiralty test, requiring a nexus to traditional maritime activities involving navigation or commerce. *See, e.g., Baizley Iron Works v. Span,* 281 U.S. 222 (1929),[34] wherein the Supreme Court stated that the test for "maritime employment" was whether the work done had "a direct and intimate connection with navigation and commerce." 281 U.S. at 230, 231, 232. In *Massman Construction Co. v. Bassett,* 30 F.Supp. 813 (E.D. Mo. 1940), *rev'd on other grounds,* 120 F.2d 230 (8th Cir. 1941) *cert. denied,* 314 U.S. 648 (1941), the Court concluded: "Maritime service has some direct relation to a vessel employed in trade, commerce, or travel upon navigable waters." 30 F.Supp. at 815. *Posavec v. Merritt-Chapman & Scott Corp.,* 106 F.Supp. 170 (S.D.N.Y. 1952) held: "Maritime employment connotes service which relates directly to the actual business of navigation.

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[33] *See* 4 Larson, *The Law of Workmen's Compensation,* §89.27, 16-181 (1980).

[34] *Baizley* was not decided under Sec. 2(4) of the Act; rather, the issue was whether the State Compensation Act could apply. The Supreme Court stated in *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1952) that the claimant in *Baizley* was not engaged in "maritime employment." 344 U.S. at 341.

The construction work here was not part of any undertaking to carry on trade, commerce or transportation on public waters." 106 F.Supp. at 172. *See also Central Engineering Co. v. Bassett,* 42 F.Supp. 750, 752 (S.D.Ill. 1941).

In *New Amsterdam Cas. Co. v. McManigal,* 87 F.2d 332 (2d Cir. 1937), the court noted that "[a]lthough the place of accident over navigable waters brought it within the jurisdiction of admiralty over torts, it does not follow that Maloney was engaged in maritime employment." *Id.* at 334. In determining maritime employment, the court used the admiralty test:

> Yet the construction of a lighthouse would seem to be no more directly related to navigation and commerce than is the construction of a lightship for the United States, which was held to be nonmaritime employment . . . [citation omitted].

Id.

In *Pennsylvania R.R. Co. v. O'Rourke,* 344 U.S. 334 (1952), the Supreme Court flatly stated that not all persons covered under the 1927 Act are engaged in "maritime employment". When discussing *Parker v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941) the Court in *Pennsylvania R.R.* noted that the claimant could not have been paid compensation in connection with his death if the Court were to test the applicability of the Act by the nature of his regular work. 344 U.S. at 341.

Pennsylvania R.R. makes clear that coverage was afforded to this non-maritime employee because he was injured upon navigable waters *and* because Section 902(4) required only that the employer have "any" employee engaged in "maritime employment". The Court noted that:

> If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in "fur-

> therance" of his employer's business, irrespective of whether he himself can be labeled "maritime."

314 U.S. at 341-342.

Of particular importance is the collection of cases made by the Court which ' 'deal with various types of construction and service workers, *obviously not themselves engaged in traditional 'maritime employment,'* if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341 (emphasis added).

Indeed, this Court explicitly distinguished between employment on navigable waters and "maritime employment".

> The Court of Appeals, we think, is in error in holding that the statute requires, as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act. An injured worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within §902(2), and whether he was a member of the crew of the vessel within the exceptions of §§902(3) and 903(a)(1). This explains the emphasis on the factor of the individual's job in Parker v. Motor Boat Sales, Inc. 314 U.S. 244, 245-246 . . .

344 U.S. 334, 340.

Calbeck v. Travelers Ins. Co., supra, while doing away with the "maritime but local" doctrine, did not "discredit" the "navigation or commerce" test; the court simply took notice of the fact that the 1927 Act contained no coverage requirement other than the "navigable waters" situs test."[11] Since the 1972 Amendments

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[11]This Court interpreted the phrase "and if recovery . . . through Workmen's Compensation proceedings may not validly be provided by State Law" as being consistent with the term "navigable waters." 370 U.S. 114, 125.

specifically premised coverage upon a claimant's status as a "maritime employee" *Calbeck's* strict "situs" coverage rule can no longer validly be applied. Nor can the affirmance of *Calbeck's* rule of concurrent jurisdiction in *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980), be interpreted as a revival of *Calbeck's* strict situs rule.

There is no language in *Sun Ship, Inc. supra,* which even remotely suggests that the occupational "status" requirement can be limited to injuries occuring on the shoreside areas described in §3(a) of the LHWCA. *Sun Ship, Inc.* dealt solely with the issue of whether state compensation remedies could apply within these areas. Nor can this Court's discussion of the prior decisions in *Calbeck v. Travelers Ins. Co.,* 370 U.S. 114 (1962) and *Davis v. Department of Labor,* 317 U.S. 249 (1942) be construed as anything more than a recognition that a zone of concurrent jurisdiction, announced in those cases, continues to exist with respect to certain claims under the LHWCA.

Absent a repeal of §2(3) of the LHWCA, *Sun Ship, Inc.* does not, and could not, reaffirm that portion of *Calbeck* which permits federal jurisdiction over claims for injuries occuring upon pre-1972 navigable waters without an inquiry into the injured employee's occupation. As noted in the decision below,

> *Sun Ship, Inc.* held only that nothing in the 1972 Amendments precludes a state from offering compensation to an employee who is admittedly covered under the expanded situs of the Act. The distinct question of *which* employees are covered under the Act is controlled by the analysis set forth in *P.C. Pfeiffer v. Ford, supra,* and applied by this Court in *Fusco II.*

652 F.2d at 258 (emphasis supplied).

Thus, the issue of concurrent jurisdiction can be reached only after it is determined that jurisdiction under

the LHWCA exists. Certainly there is nothing in *Sun Ship, Inc.* or in any other decision rendered under the LHWCA to suggest that §2(3) can be interpreted differently depending on where the employee is injured. In fact, this Court in *Sun Ship, Inc.* reaffirmed the status test as "the line that circumscribes the jurisdictional compass of the LHWCA." 447 U.S. at 725. There is no indication that this line changes at the water's edge.

The navigation or commerce test applied below is consistent with that adopted by every Circuit which has considered the issue of "maritime employment" under §2(3) of the LHWCA. *See Stockman v. John T. Clark and Son of Boston,* 539 F.2d 264, 271, 276 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *Fusco, et al. v. Perini North River Associates, et al.,* 622 F.2d 1111, 1113 (2d Cir. 1980), *cert. denied,* 449 U.S. 1131 (1981); *Sea-Land Serv. v. Director, OWCP,* 540 F.2d 629 (3d Cir. 1976); *Conti v. Norfolk & Western Ry. Co.,* 566 F.2d 890 (4th Cir. 1977); *LeMelle v. B.F. Diamond Constr. Co.,* No. 81-1559 (4th Cir. May 25, 1982);[36] *Holcomb v. Robert W. Kirk & Associates, Inc.,* 665 F.2d 589 (5th Cir. 1981), *pet. for cert. pending,* No. 81-1109;[37] *Gilliam v. Wiley M. Jackson Co.,* 659 F.2d 54, 56 (5th Cir. 1981), *pet. for cert. pen-*

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[36]The Fourth Circuit's decision in *Le Melle* rested in part on the conclusion that the construction project in which the claimant was involved was "[e]ssential to improving navigation . . ." slip op. at 6. The Court noted specifically that neither *Le Melle* nor the prior opinion in *Brown v. Root* supported the proposition that "Congress intended to include in the section 2(3) definition of maritime workers all workers held by pre-1972 judicial decisions to have been covered by the LHWCA . . ." *Id.* at n. 1.

[37]Petitioner cites *Holcomb* both in support of the *Fusco I* test and as an illustration of the application of the navigation or commerce test. *Compare:* Pet. Brief at 25; Pet. Brief at 40. In fact, the *Holcomb* Court explicitly found that claimants work "was certainly an 'integral part' of and 'directly involved in an ongoing ship repair operation.' " 655 F.2d at 594. The Court explicitly disowned the *Fusco I* analysis noting, "[w]e do not hold that every watchman of a vessel in navigable waters comes under the Longshoremen's Act." *Id.*

ding, No. 81-1039; *Hullinghorst Industries, Inc. v. Carroll,* 650 F.2d 750, 754, 756 (5th Cir. 1981), *cert. denied,* No. 81-693 (Jan. 11, 1982); *Weyerhauser Co. v. Gilmore,* 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied,* 429 U.S. 868 (1976).

The test adopted below provides a "simple, uniform standard of coverage" dependent "upon the nature, not the location, of employment." *P.C. Pfeiffer v. Ford,* 444 U.S. 69, 83 (1979). By focusing upon those workers in the industry for which federal coverage was intended, the "navigation or commerce" test is consistent with the purposes of the amended Act, the decisions rendered thereunder, and represents a rational basis for the exercise of federal jurisdiction as the test itself constitutes the "clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employer." *Weyerhauser, supra,* 528 F.2d 957, 961; *Executive Jet, supra,* 409 U.S. 249; *Foremost Insurance,* No. 80-2134, slip op. at 6, 7 (June 23, 1982).

3. APPLICATION OF THE "NAVIGATION OR COMMERCE" TEST TO INJURIES OCCURRING ANYWHERE WITHIN THE §3(a) SITUS WILL NOT RESULT IN DIFFICULTIES IN ADMINISTERING THE LHWCA.

The Director alleges that "[d]enial of LHWCA coverage to some workers injured on actual navigable waters would result in unacceptable difficulty in administering the LHWCA." Pet. Brief at 38-42. No difficulty in administration of the Act arises because some workers injured upon the §3(a) situs lack coverage. Whatever difficulties do exist result from the fact that Congress has undeniably premised coverage on an occupational status test. *P.C. Pfeiffer, supra.* Any standard that premises coverage upon conduct—as opposed to location—will require a case by case determination of whether

such conduct satisfies the statutory test in borderline situations. Nor will the necessity for such determinations change if the Director's standard (coverage for some workers premised upon situs and for others, upon status) is adopted.

Permitting disparate tests for a single term (maritime employment) can only engender additional confusion and litigation.[18] Assuming that the Director's definition of "maritime employment" is adopted, in addition to testing the limits of the occupational status test, courts will also be forced to determine the limits of an "employment upon 'actual' navigable waters" test. For example: (i) Did Congress intend to extend coverage to a concededly "non-maritime employee" who is fortuitously located upon water momentarily and injured there?; (ii) Did Congress intend to extend coverage to that same employee, who is injured after returning to shore, by virtue of his prior presence, however brief, over water?; (iii) Did Congress intend to extend coverage to a concededly "non-maritime employee" working on a covered §3(a) shore-side situs who falls and lands in or upon "actual" navigable waters, thereby resurrecting the "where the body falls" test criticized in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 225 (1969)?

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[18]As noted above, the status test will inevitably engender litigation. Obviously, borderline cases will arise even if an occupational status test is limited solely to land based workers. There will continue to be such litigation as new types of conduct are encountered by the courts, as industry changes occur, and as individuals test the limits of coverage. "The line that circumscribes the jurisdictional compass of the LHWCA—a compound of "status" and "situs"—is no less vague than its counterpart in the pre-"twilight zone" *Jensen* era." *Sun Ship, Inc., supra*, 447 U.S. at 725. All that Petitioner's definition accomplishes is to move the controversy landward; it changes neither the frequency (to any appreciable extent) nor the content of such controversy.

One definition of "maritime employment", applicable within the entire §3(a) situs, permits development of a single rational standard which will implement the purposes of the LHWCA to afford coverage to "workers who engage in maritime employment no matter where they do their job." *P.C. Pfeiffer, supra,* 444 U.S. at 78.

The court below correctly concluded that Churchill did not satisfy the occupational status test of "maritime employment."

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Respondent's Brief

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No. 81-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES, *et al.*,
Respondent.

BRIEF OF RESPONDENT, RAYMOND CHURCHILL

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	2
I. WORKERS COVERED PRIOR TO THE 1972 AMENDMENTS REMAIN COVERED	2
A. Congress Did Not Intend To Withdraw Coverage From Any Worker Covered By The Pre-1972 Act	2
B. Admiralty authorities Agree That All Injured Employees Covered Prior To 1972 Remain Covered	4
C. The Decision Of The Court Below Is Incompatible With This Court's Decision In *Calabeck* As Reaffirmed In *Sun Ship*	5
D. Affirmance Of The Lower Court's Decision Would Recreate The Jurisdictional Chaos Which Existed Prior To *Davis* and *Calbeck*	6
II. CHURCHILL WAS ENGAGED IN "MARITIME EMPLOYMENT" WHEN INJURED	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Brown & Root v. *Joyner*, 607 F.2nd 1087 (4th Circuit, 1979) Cert. denied 446 U.S. 981, 100 S.Ct. 2960, rehearing denied 448 U.S. 912, 101 S.Ct. 26, 65 L.Ed. 2nd 1172 (1980) 9

Calbeck v. *Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2nd 368 (1962) 2, 4, 5, 6, 7

Davis v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942) 5, 6

DeMartino v. *Bethlehem Steel Company*, 164 F.2nd 177 (1st Circuit, 1947) 9

Duncanson-Harrelson v. *Director, Office of Worker's Compensation Programs*, 644 F.2nd 827 (9th Circuit, 1981) 8

Luna v. *Star of India*, 356 F. Supp. 59 (SD California 1973) 8

NLRB v. *Bell Aerospace Company*, 416 U.S. 267, 284, 94 S.Ct. 1757, 40 L.Ed. 2nd 134, n.13 (1974) 3

Northeast Marine Terminal Company v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2nd 320 (1977) n.25 2, 4

Odom Construction Company v. *Department of Labor*, 622 F.2nd 110 (5th Circuit, 1980), Cert. denied 450 U.S. 966, 101 St.Ct. 1482, 67 L.Ed. 2nd 614 (1981) 9

Ryan Stevedoring Co. v. *Pan Atlantic S.C. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956) 6

Seas Shipping Co. v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 879, 90 L.Ed. 2nd 1099 (1946) 6

Sun Ship v. *Pennsylvania*, 447 U.S. 715, 724, 100 S.Ct. 2432, 65 L.Ed. 2nd 458 (1980) 3, 4, 6

Travelers Insurance Co. v. *Branham*, 136 F.2nd 873, (4th Circuit, 1943) 8, 9

Trotti & Thompson v. *Crawford*, 631 F.2nd 1214 (5th Circuit, 1980) 8

Table of Authorities Continued

Page

MISCELLANEOUS:

1A, BENEDICT ON ADMIRALTY, Sect. 17 (7th Edit. 1981) 4

G. GILMORE, & C. BLACK, THE LAW OF ADMIRALTY, pp. 429-430 (2nd Edit. 1975) 5

HR REP. No. 92-1441, 92 Cong.; 2nd Sess. (1972) . 2, 4, 8

LEVASSEUR, AN UPDATE ON LONGSHOREMEN'S & HARBORWORKER'S COMPENSATION ACT, THE FORUM, Sect. of Ins., Negl. & Compensation Law, American Bar Assn., Vol. XV, No. 2, Fall, 1979, Pg. 264 5

S. REP. No. 92-1125, 92nd Cong.; 2nd Sess. (1972) . 2, 4, 8

WATSON, BROADENED COVERAGE UNDER THE LHWCA, 33 L.A. L. Rev. 683, 1973 5

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PERINI NORTH RIVER ASSOCIATES, *et al.*,

Respondent.

BRIEF OF RESPONDENT, RAYMOND CHURCHILL

STATEMENT

Petitioner's brief contains a comprehensive statement which will not be repeated here at length. For purposes of this argument, it is sufficient to state that supporting respondent, RAYMOND CHURCHILL, was a dock-builder foreman engaged in a construction project being built by respondent PERINI NORTH RIVER ASSOCIATES. While unloading a caisson, a hollow metal cylinder to be driven into the river bottom, from the barge of which he was foreman, CHURCHILL was injured when a cable attached to the caisson snapped, throwing him into the air. The project upon which he was working was a base for a Sewage Disposal Plant, to be constructed on the shore of the North River with docking facilities for vessels to remove treated sludge for deep sea disposal.

ARGUMENT

I. WORKERS COVERED PRIOR TO THE 1972 AMENDMENTS REMAIN COVERED.

There is no doubt that, prior to the 1972 Amendments thereto, the injuries sustained by RAYMOND CHURCHILL would have been within the jurisdiction of the Longshoremen's & Harborworker's Compensation Act. (Hereafter LHWCA). As this Court stated in *Calbeck* v. *Travelers Insurance Company*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed. 2nd 368 (1962), "The [LHWCA] was designed to insure that a compensation remedy existed for all injuries sustained by employees on navigable waters." The Second Circuit Court of Appeals, in the opinion below, held that the 1972 Amendments had the effect of eliminating certain previously covered employees by adding the new requirement of "status." This Court is now squarely faced with the question left unanswered in *Northeast Marine Terminal Company* v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed. 2nd 320 (1977), n.25, "[W]hether Congress excluded people who would have been covered before the 1972 Amendments; that is, workers who are injured on navigable waters as previously defined."

A. Congress Did Not Intend To Withdraw Coverage From Any Worker Covered By The Pre-1972 Act.

The reports of the House and Senate Committees which considered the Amendments to the LHWCA prior to their passage by the full Congress, HR Rep. No. 92-1441, 92nd Congress, Second Session (1972); S. Rep. No. 92-1125, 92nd Congress, Second Session (1972) clearly indicate that Congress was concerned with uniformity of coverage for longshoremen at adequate rates of compensation, with the *quid pro quo* to employers, to offset

the expense of the new rates, of the abolition of the strict liability doctrine of "seaworthiness." *Sun Ship* v. *Pennsylvania*, 447 U.S. 715, 724, 100 S.Ct. 2432, 65 L.Ed. 2nd 458 (1980). Thus, the summary introducing the report advises that the principle purpose of the bill is to "*extend* coverage to protect additional workers." (Emphasis supplied), and the section-by-section analyses of both reports, after setting forth the specific inclusion of Longshoremen, Harborworkers, Ship Repairmen, Builders and Breakers, state, "It does not exclude other employees traditionally covered," again, indicating that it was the *only* intention of Congress to extend coverage to injuries on land, and in no way to revoke, limit or rescind coverage to workers "traditionally covered."

The importance which Congress attached to the elimination of the unseaworthiness doctrine can readily be seen by the length of that section of the committee reports devoted to this provision, more than four and one-half pages of the report, complete with citations of those decisions of this Court which are being legislatively overruled. In comparison, the section covering the landward extension of the Act, which has accounted for virtually all post-amendment litigation, covers less than two pages. Obviously, had Congress intended a result as drastic as an exclusion of previously covered workers it is not unreasonable to expect that it would have said so expressly. *NLRB* v. *Bell Aerospace Company*, 416 U.S. 267, 284, 94 S.Ct. 1757, 40 L.Ed. 2nd 134, n.13 (1974).

A second major purpose of the 1972 Amendment was to extend a uniform compensation system to employees who otherwise would be covered by the LHWCA only for a part of their activity, i.e., that part performed on navigable waters. Again tailored specifically for the protection of longshoremen, this landward extension of the Act co-

vered those who walked in and out of coverage frequently during the day each time they crossed from land to water. Anticipating the possibility of a *Calbeck*-like decision of this Court, holding that all employees injured on *extended* navigable waters are covered, Congress specifically excluded from coverage those not engaged in "loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activities." HR Rep. No. 92-1441; S Rep. No. 92-1125 *supra*.

The extended coverage provided by the 1972 Amendments was remedial in nature and enacted out of solicitude for maritime workers. *Sun Ship* v. *Pennsylvania*, *supra*. A broad and expansive view is appropriate for remedial legislation which must be liberally construed in conformance with its purpose in a way which avoids harsh and incongruous results. *Northeast Marine Terminal Co.* v. *Caputo*, *supra*.

B. Admiralty Authorities Agree That All Injured Employees Covered Prior To 1972 Remain Covered.

Benedict on Admiralty, probably the leading authority in the maritime field, succinctly sums up the rationale behind continuing coverage, "On the basis that there can be nothing more maritime than the sea, every employment on the sea or other navigable water should be considered as maritime employment." 1A *Benedict on Admiralty*, Sect. 17 (7th Edition, 1981). Professors Gilmore and Black, in a more lengthy treatment of the subject, conclude, "Presumably any worker injured on navigable waters will continue to be covered (as he has been in the past) without any inquiry into what he was doing (or supposed to be doing) at the time of his injury. However, a worker injured on an 'adjoining' land area will

be covered only if he was 'engaged in loading, unloading, repairing or building a vessel.' " G. Gilmore and C. Black, *The Law of Admiralty*, pp. 429-430 (2nd Edition, 1975). The 1972 Amendments were not intended to exclude any formerly covered employees. Levasseur, an update on Longshoremen's & Harborworker's Compensation Act—jurisdiction, status, situs, Federal pre-emption, *The Forum*, Section of Insurance, Negligence and Compensation Law, American Bar Association, Volume XV, No. 2, Fall, 1979, Pg. 264. Hopefully, the Courts will not infer that Congress intended to eliminate compensation in areas to which it had previously been granted (i.e., upon navigable waters) Watson, Broadened Coverage Under the LHWCA 33 L.A. L. Rev. 683, 1973). No authority has been found urging the restrictive interpretation placed upon the 1972 Amendments by the Court below.

C. The Decision Of The Courts Below Is Incompatible With This Court's Decision In *Calbeck* As Reaffirmed In *Sun Ship* .

The passage of the 1927 LHWCA immediately embroiled the Courts in a jurisdictional quagmire resulting in *ad hoc* determinations as to whether a particular employment was maritime and directly affecting navigation, in which case Federal coverage would be exclusive, or maritime but local and within the reach of state Worker's Compensation Laws. Fifteen years of case-by-case struggle resulted in *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942) which established a "twilight zone" within the reach of both state and Federal compensation law. Thereafter, this Court completely cut that jurisdictional Gordian Knot in *Calbeck* v. *Travelers Insurance Company, supra.*

Without limiting a state's jurisdiction over local maritime matters, the Court unequivocally stated that the

Federal Act, "Reaches all those cases of injury to employees on navigable waters * * * whether or not a particular one was also within the constitutional reach of a state workmen's compensation law." The continuing viability of *Calbeck* and *Davis*, questioned after the 1972 Amendments, was reaffirmed by this Court's approving quotation in *Sun Ship* v. *Pennsylvania*, *supra*. Inasmuch as CHURCHILL was indisputably injured on pre-1972 navigable waters an affirmance by this Court of the decision below would *de facto* overrule *Calbeck*, a result which this Court specifically declined to adopt as recently as *Sun Ship* v. *Pennsylvania*, *supra* n.4.

Congress was specific in its intent to eliminate the seaworthiness doctrine established by this Court, legislatively overruling *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 2nd 1099 (1946) and *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956). Is it, then, permissable, in the face of such legislative specificity, to *infer* a reversal of *Calbeck* and *Davis?*

D. Affirmance Of The Lower Court's Decision Would Recreate The Jurisdictional Chaos Which Existed Prior To *Davis* and *Calbeck*.

The 1927 LHWCA, intended to create a Federal remedy for those workers beyond the reach of state compensation acts, additionally and inadvertently created a jurisdictional can of worms. From its enactment in 1927 until this Court decided *Davis* v. *Department of Labor* in 1942, the lower courts had struggled with a "navigation or commerce test" to determine whether an activity had a significant impact on navigation and was exclusively within Federal jurisdiction, or whether, although performed on navigable waters, its impingement on navigation or commerce was minimal and, therefore, qualified it

as "maritime but local" and excluded from Federal coverage. *Davis*, attempting to remove both employers and employees from the "horns of the jurisdictional dilemma" created a "twilight zone" of overlapping state and Federal coverage to avoid the harsh result of an injured worker erroneously filing a claim in the wrong forum, only, ultimately, to find himself precluded after a jurisdictional dismissal.

This decision, while avoiding the harsh result of precluding recovery in a proper forum, did nothing to lessen the flood of jurisdictional litigation. The judicial creation of the doctrine of "seaworthiness" created a tantilizing field of negligence litigation which, however, would be precluded by a finding that the injured worker's activities came within the LHWCA. Jurisdictional litigation continued unabated, as claimants and their attorneys twisted and turned to obtain jurisdiction in the most beneficial forum.

Calbeck, while not eliminating such jurisdictional litigation, finally laid a precise ground rule. Terminating the concept of "maritime but local" this Court held, categorically and without exception, and in spite of clear language in the statute which appeared to indicate that the LHWCA only applied to those workers outside the reach of state compensation acts, that all injuries occurring on navigable waters came within the purview of the Act. However, the certainty imposed by *Calbeck* lasted a mere decade. With the 1972 shoreward extension the inclusion of a "status" requirement appears to some courts to have resurrected the dark ages of the "navigation or commerce" test requiring *ad hoc* inquiry as to the effects on navigation or commerce of each claimant's particular employment. Such reactionary reasoning is totally alien to the liberal construction to be given this social legislation.

II. CHURCHILL WAS ENGAGED IN "MARITIME EMPLOYMENT" WHEN INJURED.

Even if this Court were to apply the requirement of "maritime employment" to injuries occurring on navigable waters, it is clear that CHURCHILL'S employment had this status. His injury was sustained as the result of the unloading of a vessel. The notes of the Congressional Committee indicate a clear intent to cover workers engaged in loading, unloading, repairing or building vessels, HR Rep. No. 92-1441, S Rep. No. 92-1125, *supra*. In addition, at the time of the 1972 Amendments "Longshoring Operations," which are specifically cited as covered employment, are defined as "The loading, unloading, moving or handling cargo, ships stores, gear, etc. into, in or out of any vessel on the navigable waters of the United States." 29 CFR 1918-3(i). Nor can it be disputed that the barge upon which CHURCHILL sustained his injury was a vessel. *Travelers Insurance Company* v. *Branham*, 136 F.2nd 873 (4th Circuit 1943; *Luna Star of India*, 356 F. Supp. 59 (SD California 1973).

Assuming, *arguendo*, that it is the overall nature of petitioners employment, as opposed to his activities at the specific time of injury which determine whether employment was maritime in nature, CHURCHILL still meets this status test. Although the purpose of the Perini North River Project was the construction of a Sewage Disposal Plant, a necessary incident to that disposal was the provision of mooring and loading facilities for ships to remove the treated sludge for deep-sea disposal. The courts have universally held workers injured in the construction of harbor facilities to be within the Act. *Duncanson-Harrelson* v. *Director, Office of Worker's Compensation Programs*, 644 F.2nd 827 (9th Circuit, 1981) (construction of oil tanker dock and pier enlargement project); *Trotti & Thompson* v. *Crawford*, 631

F.2nd 1214 (5th Circuit, 1980) (construction of piers); *Odom Construction Company* v. *Department of Labor*, 622 F.2nd 110 (5th Circuit, 1980), Cert. denied, 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed. 2nd 614 (1981) (moving mooring blocks in a canal); *Brown & Root, Inc.* v. *Joyner*, 607 F.2nd 1087 (4th Circuit, 1979) Cert. denied 446 U.S. 981, 100 S.Ct. 2960, rehearing denied 448 U.S. 912, 101 S.Ct. 26, 65 L.Ed. 2nd 1172 (1980) (building of drydock traditionally held to be maritime employment); *DeMartino* v. *Bethlehem Steel Company*, 164 F.2nd 177 (1st Circuit, 1947) (Painting of dock); *Travelers Insurance Company* v. *Branham*, *supra* (construction of drydock). There can be no doubt that the transshipment of treated sewage by vessel over navigable waters has a significant maritime impact, and the construction of facilities for that purpose is clearly within the realm of traditional maritime employment.

CONCLUSION

The decision of the Court of Appeals should be reversed and a finding made that RAYMOND CHURCHILL falls within the coverage of the Longshoremen & Harborworker's Act as amended in 1972.

Respectfully submitted,

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No. 81-897

In the Supreme Court of the United States

OCTOBER TERM, 1982

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PERINI NORTH RIVER ASSOCIATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Page

Cases:

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150 6

Baker v. *Carr*, 369 U.S. 186 6

Baltimore & Philadelphia Steamboat Co. v. *Norton*, 284 U.S. 408 8

Batterton v. *Francis*, 432 U.S. 416 3

Boudreaux v. *American Workover, Inc.*, 680 F. 2d 1034 ..... 9, 11, 12, 13, 14, 15, 16, 17

Brown & Root, Inc. v. *Joyner*, 607 F. 2d 1087, cert. denied, 446 U.S. 981 11

Calbeck v. *Travelers Insurance Co.*, 370 U.S. 114 ..... 14, 15, 16, 17

Coleman v. *Miller*, 307 U.S. 433 7

Davis v. *Department of Labor*, 317 U.S. 249 ..... 13, 15, 16-17

Debs, In re, 158 U.S. 564 7

Director, OWCP v. *Donzi Marine, Inc.*, 586 F. 2d 377 ..... 3, 4

Director, OWCP v. *Eastern Coal Corp.*, 561 F. 2d 632 6-7

Director, OWCP v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904, vacating and remanding *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, aff'd on remand, 575 F. 2d 79, cert. denied, 440 U.S. 967 2

Page

Cases—Continued:

Director, OWCP v. *National Van Lines*, 613 F. 2d 972, cert. denied, 448 U.S. 907 4

Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F. 2d 110 ..... 4, 10

Director, OWCP v. *O'Keefe*, 545 F. 2d 337 4

Director, OWCP v. *Rasmussen*, 436 U.S. 955 ..... 2, 4

Director, OWCP v. *Rochester & Pittsburgh Coal Co.*, 678 F. 2d 17 4

Director, OWCP v. *Walter Tantzen, Inc.*, 446 U.S. 905, vacating and remanding *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F. 2d 670, rev'd on remand, 624 F. 2d 5 3

Executive Jet Aviation, Inc. v. *City of Cleveland*, 409 U.S. 249 17

Flast v. *Cohen*, 392 U.S. 83 5

Foremost Insurance Co. v. *Richardson*, No. 80-2134 (June 23, 1982) 17

Fusco v. *Perini North River Associates*, 601 F. 2d 659, vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F. 2d 1111, cert. denied, 449 U.S. 1131 ..... 3, 11

Hardaway Contracting Co. v. *O'Keefe*, 414 F. 2d 657 14

Page

Cases—Continued:

I.T.O. Corp. of Baltimore v. *Benefits Review Board*, 542 F. 2d 903, vacated, 433 U.S. 904, rev'd on remand on other grounds, 563 F. 2d 646 ..... 3, 4

Ingalls Shipbuilding Division v. *White*, 681 F. 2d 275 ..... 4, 5

International Union of Mine, Mill & Smelter Workers v. *Eagle-Picher Co.*, 325 U.S. 335 ..... 3, 4

LeMelle v. *B.F. Diamond Construction Co.*, 674 F. 2d 296, petition for cert. pending, No. 81-2362 11

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 ..... 2, 6

P.C. Pfeiffer Co. v. *Ford*, 444 U.S. 69 11

Peter v. *Arrien*, 463 F. 2d 252, aff'g 325 F. Supp. 1361 14

Shahady v. *Atlas Tile & Marble Co.*, 673 F. 2d 479 ..... 4, 5

Sierra Club v. *Morton*, 405 U.S. 727 4

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 6

Simpson v. *Director, OWCP*, 681 F. 2d 81 4

Sun Ship, Inc. v. *Pennsylvania*, 447 U.S. 715 ..... 14, 16

Travelers Insurance Co. v. *Branham*, 136 F. 2d 873 14

Page

Cases—Continued:

United Marine Mutual Indemnity Association v. *Marshall*, 510 F. Supp. 34, appeal pending, No. 81-4033 (9th Cir., filed Feb. 2, 1981) (argued Feb. 12, 1982) 9

United States v. *Federal Maritime Commission*, 655 F. 2d 247 7

United States ex rel. Chapman v. *Federal Commission*, 345 U.S. 153 7

Valley Forge Christian College v. *Americans United for Separation of Church and State*, No. 80-327 (Jan. 12, 1982) 6

Washington Utilities & Transportation Commission v. *FCC*, 513 F. 2d 1142 7

Constitution, statutes, regulations and rule:

United States Constitution, Article II, Section 2 ..... 1, 2

Black Lung Reform Act of 1977, 30 U.S.C. (Supp. IV) 932(k) 9

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.* :

Section 7(b), 33 U.S.C. 907(b) 8
Section 8(i), 33 U.S.C. 908(i) 8
Section 14(j), 33 U.S.C. 914(j) 8
Section 18, 33 U.S.C. 918 8
Section 19(c), 33 U.S.C. 919(c) 5
Section 19(d), 33 U.S.C. (Supp. IV) 919(d) 5

Page

Constitution, statutes, regulations and rule—Continued:

Section 21(b)(3), 33 U.S.C. 921(b)(3) 5
Section 21(c), 33 U.S.C. 921(c) 1, 3, 4, 5
Section 29, 33 U.S.C. 929 8
Section 32, 33 U.S.C. 932 9
Section 32(a)(2), 33 U.S.C. 932(a)(2) 9
Section 39(a), 33 U.S.C. 939(a) 5
Section 39(c)(1), 33 U.S.C. 939(c)(1) 7-8
Section 41, 33 U.S.C. 941 8
Section 44, 33 U.S.C. 944 8

Longshoremen's and Harbor Workers' Compensation Act Amendment of 1972, Section 1, 33 U.S.C. 921a 6

28 U.S.C. 1254(1) 3, 5-6

28 U.S.C. 1333(1) 17

Sup. Ct. R. 19.6 6

Fed. R. App. P. 15(a) 5

20 C.F.R. :

Section 701.201 5
Section 702.333(b) 5
Section 801.401 5
Section 802.410(b) 5
Section 820.410(b) 5

Page

Miscellaneous:

118 Cong. Rec. 36385 (1972) 14

S. Rep. No. 95-209, 95th Cong., 1st Sess. (1977) 4, 10

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 12, 13

1A *Benedict on Admiralty* (7th ed. 1981) 17

G. Gilmore & C. Black, *The Law of Admiralty* (2d ed. 1975) 15

3 A. Larson, *The Law of Workmen's Compensation* (1976) 7, 8

4 A. Larson, *The Law of Workmen's Compensation* (1981) 15

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REPLY BRIEF FOR THE PETITIONER

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1. Respondents Perini North River Associates and Hartford Accident and Indemnity Company (hereinafter jointly referred to as "Perini") first argue that the Director of the Office of Workers' Compensation Programs does not have standing to obtain review of the decision below in this Court (Resp. Br. 7-18). Perini argues that, in order to present a justiciable "case" or "controversy" as required by Article III, Section 2 of the United States Constitution, the Director must be "adversely affected or aggrieved" (Resp. Br. 7-8). This is the same requirement that Section 21(c) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 921(c), imposes on persons petitioning a court of appeals for review of decisions by the Benefits Review Board. Perini maintains (Resp. Br. 10) that only claimant Raymond Churchill, who was denied coverage

under the Act and who appears before this Court as a respondent supporting the Director's petition, has standing to request review in this Court. The Director, in Perini's view, "has suffered no injury in fact to any interest, either pecuniary or administrative, and therefore has no standing under Article III to obtain this Court's review of the decision below" (*id.* at 16). This standing argument fails for several reasons.

a. As Perini candidly acknowledges (Resp. Br. 7 n.3), this Court has repeatedly recognized the Director's capacity to petition for a writ of certiorari in cases arising under the LHWCA. Ten days after discussing the propriety of the Director's participation in the court of appeals before his formal designation as the proper federal party (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977)), this Court granted a certiorari petition filed by the Director without the participation of the claimant. *Director, OWCP* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977), vacating and remanding *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (5th Cir. 1976), aff'd on remand, 575 F. 2d 79 (1978), cert. denied, 440 U.S. 967 (1979). A year later, the Court again considered a petition for certiorari filed by the Director, this time in a case in which the Director challenged the result reached by the Board and affirmed by the court of appeals. *Director, OWCP* v. *Rasmussen*, 436 U.S. 955 (1978). The Court granted the Director's petition, as well as the petition of the employer and insurer, without expressing any doubts about the propriety of the Director's status in the case, even though the government's petition (77-1465 Pet. 2 n.1) directed the Court's attention to the issue. Finally, in 1980, the Court granted another petition filed solely by the Director, despite the respondent's objection that the Director lacked standing to seek review of an adverse court of appeals decision in a coverage case. *Director, OWCP* v.

Walter Tantzen, Inc., 446 U.S. 905 (1980), vacating and remanding *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F. 2d 670 (2d Cir. 1979), rev'd on remand, 624 F. 2d 5 (1980).

b. Perini concedes (Resp. Br. 15 n.11) that the Director was a proper party respondent before the court of appeals in this litigation. As a party respondent in the court of appeals, the Director is clearly entitled by statute to petition for review in this Court. 28 U.S.C. 1254(1) (writ of certiorari may be granted "upon the petition of any party"). Indeed, even intervenors in the lower courts have standing to petition for a writ of certiorari. See *Batterton* v. *Francis*, 432 U.S. 416, 424 n.7 (1977); *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher Co.*, 325 U.S. 335, 337-339 (1945). In these circumstances, there can be little serious question regarding the standing of the Director in this Court.

Perini ignores the fact that the Director has been a proper party to this litigation before both the Benefits Review Board and the court of appeals, and instead relies exclusively on cases addressing the standing of parties to seek judicial resolution of a dispute in the first instance. Perini cites no cases to support the novel proposition that a concededly proper party to a lower court proceeding somehow losses its standing at the Supreme Court level in an otherwise justiciable controversy.[1]

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[1]Perini relies (Resp. Br. 12) principally on three LHWCA cases construing 33 U.S.C. 921(c) to support its contention that the Director lacks standing in this Court because he is not "adversely affected or aggrieved" by the decision below. *I.T.O. Corp. of Baltimore* v. *Benefits Review Board*, 542 F. 2d 903 (4th Cir. 1976), vacated, 433 U.S. 904 (1977), rev'd on remand on other grounds, 563 F. 2d 648 (1977); *Director, OWCP* v. *Donzi Marine, Inc.*, 586 F. 2d 377 (5th Cir. 1978); *Fusco* v. *Perini North River Associates* (Fusco I), 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980) rev'd on remand, 622 F. 2d 1111 (2d 1980), cert. denied, 449 U.S. 1131 (1981). These decisions, however, clearly do not control standing in this Court.

As this Court has stated, "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions." *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972).

First, the opinions address only the right of the Director to petition for review in the courts of appeals. Second, to the extent that these opinions restrict the Director's ability to seek review under 33 U.S.C. 921 (c), they seriously misconstrue the nature of the Director's administrative responsibilities under the Act. See discussion at pages 6-9, *infra*. The Court of Appeals for the District of Columbia Circuit has correctly held that "the Director's general supervisory and enforcement interest, apart from any pecuniary interest, is sufficient to confer upon the Director standing to file as a petitioner for review under Section 921(c)" as a party aggrieved. *Shahady* v. *Atlas Tile & Marble Co.*, 673 F. 2d 479, 483 (1982), citing *Director, OWCP* v. *National Van Lines*, 613 F. 2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980). Accord, *Simpson* v. *Director, OWCP*, 681 F. 2d 81, 82 (1st Cir. 1982). See also *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F. 2d 17, 18-19 n.2 (3d Cir. 1982) (citing, *inter alia*, *Director, OWCP* v. *O'Keefe*, 545 F. 2d 337 (3d Cir. 1976) (Third Circuit "has implicitly recognized the Director's standing as a petitioner" under 33 U.S.C. 921(c)).

Indeed, both the Fourth and Fifth Circuits have clarified the positions originally taken in *I.T.O.* and *Donzi Marine*. The Fourth Circuit has now concluded that the Director has standing to petition for review under 33 U.S.C. 921(c) based on "the legislative and judicial development since *I.T.O. Corp.* was decided." *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F. 2d 110, 114 (4th Cir. 1982). Although that case involved the pecuniary interests of the Director in the proper implementation of the LHWCA, 676 F. 2d at 114, the court's decision clearly did not rest on that ground alone. The Fourth Circuit cited a case from the D.C. Circuit that granted the Director standing solely because of his administrative responsibilities under the Act (*Director, OWCP* v. *National Van Lines, supra*), noted that this Court granted the Director's petition for certiorari in *Director, OWCP* v. *Rasmussen*, 436 U.S. 955 (1978), and relied upon the legislative history of the Black Lung Benefits Act, where Congress stated that the Director had standing under the LHWCA to "advance his views in the formal claims litigation context whether or not [he] had a direct financial interest in the outcome of the case" (S. Rep. No. 95-209, 95th Cong., 1st Sess. 21-22 (1977)). The Fifth Circuit, for its part, has now concluded that "Congress intended the Secretary to play an active role in implementing, administering and enforcing the LHWCA." *Ingalls Shipbuilding Division* v. *White*, 681 F. 2d 275, 286 (5th Cir. 1982). The Fifth

"But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,'* * * is one within the power of Congress to determine." *Ibid.*, quoting *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968). The LHWCA and its implementing regulations grant the Director standing to participate at every level, administrative or judicial, of a LHWCA coverage dispute.[2] *Shahady* v. *Atlas Title & Marble Co.*, 673 F. 2d 479, 483 (D.C. Cir. 1982). Because the Director participated as a party in the court of appeals, his petition for a

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Circuit therefore has held that under Rule 15(a) of the Federal Rules of Appellate Procedure, the Director has standing as a respondent in the court of appeals to support or challenge any petition for review. "The Director is the administrator of the Act, and he therefore bears the responsibility of ensuring its fair and consistent operation." *Ingalls Shipbuilding Division* v. *White, supra*, 681 F. 2d at 284.

[2]Section 39(a) of the LHWCA declares that "the Secretary shall administer the provisions of this [Act], and for such purpose the Secretary is authorized (1) to make such rules and regulations * * * as may be necessary in the administration of this [Act]." 33 U.S.C. 939(a). The Secretary, in turn, has designated the Director as the agency official "responsible for the administration and enforcement" of the LHWCA, among other statutes. 20 C.F.R. 802.410(b), 701.201. Agency regulations provide that when any LHWCA claim advances to a hearing before an administrative law judge (ALJ) pursuant to 33 U.S.C. 919(c), 919(d), Labor Department attorneys "may appear and participate" in that hearing "on behalf of the Director as an interested party." 20 C.F.R. 702.333(b).

Following the issuance of the ALJ's decision, "any party in interest" may appeal the matter to the Benefits Review Board. 33 U.S.C. 921(b)(3). The Secretary has directed Labor Department attorneys to appear before the Board to participate with respect to "any issues requiring representation of the Secretary [or] the Director * * *." 20 C.F.R. 801.401. The Board, in fact, allows the Director "automatic" standing in any case before it. See *Ingalls Shipbuilding Division* v. *White, supra*, 681 F. 2d at 281.

"Any person adversely affected or aggrieved by a final order of the Board may obtain review" in the appropriate United States court of appeals. 33 U.S.C. 921(c). The Act further specifies that "[a]ttorneys

writ of certiorari under 28 U.S.C. 1254(1) brings claimant Churchill before this Court as a party respondent. See Sup. Ct. R. 19.6. Thus, the admittedly justiciable dispute over Churchill's claim for compensation under the Act is properly before the Court. It is therefore "assure[d] that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, No. 80-327 (Jan. 12, 1982), slip op. 7.

c. Perini confuses the Director's interest in the proper resolution of LHWCA cases with the interests of private parties, whose standing to litigate the merits of a particular case depends upon their economic or other "personal stake in the outcome of the controversy." See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Thus, Perini relies exclusively on cases addressing the standing of private individuals or organizations to litigate a private dispute or challenge a governmental action. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970).

The Director, however, appears "not as a private individual in any sense, but as the authorized representative of the Department of Labor," which is entrusted with responsibility for the administration of the LHWCA. *Director,*

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appointed by the Secretary shall represent the Secretary" in the courts of appeals. 33 U.S.C. 921a. Agency regulations provide that the Director, as the designed official "responsible for the administration and enforcement" of the Act, "shall be deemed to be the proper party on behalf of the Secretary of Labor in all review proceedings" in the courts of appeals. 20 C.F.R. 820.410(b), cited with apparent approval in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 256 n.11 (1977).

OWCP v. *Eastern Coal Corp.*, 561 F. 2d 632, 646 (6th Cir. 1977). The Director's interest in this case, therefore, is not analogous to that of private parties, but to the interest of government officials seeking to carry out their duties under particular statutes. See, *e.g.*, *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153, 155-156 (1953); *Coleman* v. *Miller*, 307 U.S. 433, 441-442 (1939); *In re Debs*, 158 U.S. 564, 584-586 (1895); *United States* v. *Federal Maritime Commission*, 655 F. 2d 247, 251-252 (D.C. Cir. 1980); *Washington Utilities & Transportation Commission* v. *FCC*, 513 F. 2d 1142, 1149-1152 (9th Cir. 1975). Contrary to Perini's observation (Resp. Br. 11) that the Director "has no interest, pecuniary or administrative, which has been adversely affected" by the decision below, the Director, as the executive official responsible for the administration and enforcement of the LHWCA, has a material interest in the proper construction and application of the Act. That interest, furthermore, is engaged every time the Director concludes that a court has incorrectly adjudicated a particular claim, no matter who stands to benefit personally from the resolution of the dispute—the affected employee, employer, or insurer.

The Director has many specific administrative duties under the LHWCA to promote the public interest[3] and to aid the adjudication of individual LHWCA claims. See generally *Director, OWCP* v. *Eastern Coal Corp.*, *supra*, 561 F. 2d at 643-644. Perhaps most important, Section

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[3]Adjudications under the LHWCA are not merely private actions between individual litigants. Rather, they are workers' compensation actions in which the public, through its government officials, has a concrete interest. Professor Larson has summarized the nature of the public interest in workers' compensation as follows:

> [T]he entire compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the cost of compensation protection in the price of the

39(c)(1) of the Act, 33 U.S.C. 939(c)(1) provides that "[t]he [Director] shall, upon request, provide persons covered by this [Act] with information and assistance relating to the [Act's] coverage and compensation and the procedures for obtaining such compensation including assistance in processing a claim." This section specifies that the Director may provide such persons "with legal assistance in processing a claim" and may provide employees receiving compensation under the Act with "information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available." *Ibid.*

Section 39(c)(1) represents but a part of the Department of Labor's responsibilities for the proper administration of the LHWCA. The agency has numerous additional administrative and enforcement duties under the Act.[4] The Office of Workers' Compensation Programs, however, cannot properly fulfill even its most basic function of providing claimants with "information and assistance relating to the [Act's] coverage and compensation" (33 U.S.C. 939(c)(1)) if the Director is not allowed to press review of decisions he believes wrongly construe the Act. The present case is illustrative. The question whether LHWCA coverage extends to marine construction workers injured upon actual navigable waters is an extremely important one, and the conflicting opinions of various courts of appeals on this issue have caused considerable uncertainty and confusion for large

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product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief * * *.

3 A. Larson, *Law of Workmen's Compensation* § 82.41 (1976). See *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932).

[4]See 33 U.S.C. 907(b), 908(i), 914(j), 918, 929, 941, 944.

numbers of claimants. See, *e.g.*, Pet. Br. 38-42. See also *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034 (5th Cir. 1982) (en banc). The confusion created by the decision below, furthermore, imposes conflicting enforcement responsibilities upon the Director.[5] The Director, therefore, must be able to seek resolution of the important coverage issue presented by this case if he is to fulfill his statutory obligations.[6]

Finally, Congress has recently clarified its intent to give the Secretary standing to pursue judicial review in all LHWCA cases. When passing the Black Lung Benefits Reform Act of 1977, which incorporates the procedures of the LHWCA, Congress explicitly provided that "[t]he Secretary shall be a party in any proceeding relative to a claim" for black lung benefits. 30 U.S.C. (Supp. IV) 932(k).

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[5]For example, the LHWCA gives the Secretary of Labor responsibility for the strict regulation of employers who desire to carry on employment subject to the Act's coverage without buying insurance from an authorized insurance carrier. 33 U.S.C. 932(a)(2). At issue here is an unsettled question concerning the Act's coverage of an entire range of industries (those, like marine construction, whose operations are not directly related to commercial shipping but are nevertheless regularly performed at least in part on navigable waters). The decision below gives marine construction employers within the Second Circuit apparent authority to conduct their business without compliance with 33 U.S.C. 932. The Director, however, is obligated to enforce the insurance requirements against similar employers in the Fifth Circuit. See *Boudreaux* v. *American Workover, Inc., supra.* Cf. *United Marine Mutual Indemnity Association* v. *Marshall*, 510 F. Supp. 34 (N.D. Cal. 1981), appeal pending, No. 81-4033 (9th Cir., filed Feb. 2, 1981) (argued Feb. 12, 1982).

[6]Because of the rather modest amount of most awards under the Act, and the significant legal costs associated with appellate review, individual claimants often lack the financial incentive to justify a petition for certiorari. If the Director cannot appear in this Court in such cases, the court of appeals' panels will establish the law for their circuits in a manner effectively immune from further review.

The Senate Committee on Human Resources (successor to the Committee on Labor & Public Welfare that drafted the 1972 amendments to the LHWCA) explained that this provision in the Black Lung Act merely tracked the Committee's earlier intent regarding standing under the LHWCA:

> Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended Longshoremen's and Harbor Workers' Compensation Act confers standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and appeal of claims. In establishing the Longshore Act procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case. The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the Act should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the Act to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board and appropriate United States Courts.

S. Rep. No. 95-209, 95th Cong., 1st Sess. 21-22 (1977). Congress thus intended to confer standing on the Secretary or his designee at any stage of the adjudication process under the LHWCA. See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F. 2d 110, 113-114 (4th Cir. 1982). Accordingly, the Director has standing to seek review of the court of appeals' decision in this Court.

2. Perini asserts (Resp. Br. 27-30, 39) that the courts of appeals have uniformly rejected the argument that all work on the water is "maritime employment" within the meaning of the 1972 amendments and that the courts all utilize the "significant relationship to navigation or commerce" test to define coverage under the LHWCA. The Fifth Circuit, however, has recently issued an en banc decision adopting the position urged here by the Director.[7] In *Boudreaux* v. *American Workover, Inc.*, 680 F. 2d 1034 5th (1982),[8] the court found LHWCA coverage for a marine petroleum worker injured aboard a drilling vessel on navigable waters. The court based its decision on the fact that "Boudreaux was engaged in employment at the time of the accident that was compensable under the LHWCA prior to the [1972] amendment as occurring on the navigable waters." *Id.* at 1038 (citation omitted). In its detailed and thoughtful analysis, the court traced the history of coverage under the pre-1972 Act, the cases demonstrating what was deemed to be "maritime employment" before the 1972 amendments,

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[7]The Fifth Circuit is not alone in its agreement with the Director's position in this case. As explained in our opening brief (Pet. Br. 24-26, 28-31), the Second Circuit originally held that workers injured upon actual navigable waters are by definition "maritime" employees within the meaning of the amended LHWCA, because they would have been covered under the 1927 Act. The Second Circuit abandoned this position only because it misinterpreted this Court's decision in *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979). See *Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, rev'd on remand, 622 F. 2d 1111 (2d 1980), cert. denied, 449 U.S. 1131 (1981). Moreover, the Fourth Circuit has found LHWCA coverage for workers injured on the water, largely because those workers would have been covered before the 1972 amendments. *LeMelle* v. *B.F. Diamond Construction Co.*, 674 F. 2d 296 (4th Cir. 1982), petition for cert. pending, No. 81-2362; *Brown & Root, Inc.* v. *Joyner*, 607 F. 2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980). See Pet. Br. 25.

[8]This en banc decision replaces the panel decision published at 664 F. 2d 463 (5th 1981), cited in respondents' brief at pages 27-28.

and the congressional intent evidenced in the 1972 legislative history. This analysis led the court to adopt the view the Director urges here: "[A]n employee injured on the waters in the course of his employment satisfies the 1972 revision's 'maritime employment' test, because employment on the water *is* 'maritime employment' within the meaning of the LHWCA both before and after its 1972 revision." 680 F. 2d at 1039 (emphasis in original).

Contrary to Perini's contention (Resp. Br. 35-36) that "maritime employment" requires a "nexus to traditional maritime activities involving navigation or commerce," the Fifth Circuit noted that, before 1972, " all employment-related injuries on navigable waters * * * were considered to have been in maritime employment," including those "[m]aritime but local" injuries having no direct relationship to navigation or commerce. *Boudreaux* v. *American Workover, Inc., supra*, 680 F. 2d at 1045. See also Pet. Br. 13-14. The 1972 amendments, moreover, reveal a clear legislative intent to broaden coverage to "maritime" employees injured on specified areas adjoining navigable waters, not to " 'exclude other employees traditionally covered.' " 680 F. 2d at 1042, quoting S. Rep. No. 92-1125, 92d Cong., 2d Sess. 16 (1972). The court found "no legislative intent to alter the previously accepted construction of the Act as considering employment on navigable waters to be 'maritime employment.' " 680 F. 2d at 1048. The Fifth Circuit had in the past attempted to apply the "significant relationship to navigation or commerce" test, but rejected it in *Boudreaux* as being contrary to congressional intent. "For employees injured in the course of [employment on navigable waters], no further examination into the relationship of their employment activities to ' "traditional maritime activity involving navigation and commerce on navigable waters," ' * * * is necessary, because by settled construction of the Act their duties necessarily constitute such maritime activity." *Ibid.*, citation omitted. The court concluded

that "the 1972 LHWCA amendments did not in any way diminish the traditional coverage of workers injured at work on navigable waters, who under the Act have been and are considered to be in 'maritime employment.' " 680 F. 2d at 1054. Thus, the federal court most familiar with maritime law and litigation under the LHWCA, the Fifth Circuit, sitting en banc, has adopted the position urged by the Director for the precise reasons stated in our opening brief.

3. Perini's own discussion of the legislative history of the 1972 amendments (Resp. Br. 21-23) plainly demonstrates that this history supports the Director's position that traditionally covered employment on the water remains covered under the amended Act. There is relatively little history on the coverage question,[9] but what there is all supports the conclusion that Congress intended to expand—not contract—coverage. See Pet. Br. 18-23.

The Senate Report describing the coverage provisions of the amended Act states in the clearest possible language that the new definition of covered employees includes the listed categories of "maritime" workers but "does not exclude other employees traditionally covered * * *." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 16 (1972). Perini counters this unambiguous evidence of congressional intent with the surprising assertion that marine construction workers "were not employees *traditionally* covered under the 1927 Act" (Resp. Br. 21-22 n.19). Remarkably, Perini cites *Davis* v. *Department of Labor*, 317 U.S. 249 (1942), as support for this proposition. *Davis*, however, establishes just the opposite: that marine construction workers *were* traditionally covered under the pre-1972 Act. As explained in our opening brief (Pet. Br. 16-17), this Court in *Davis* held that a marine construction workers who drowned

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[9] As noted in our opening brief (Pet. Br. 18-19), the coverage issue was not the primary concern of the 1972 amendments to the LHWCA.

while dismantling an abandoned bridge across a navigable river was within the "twilight zone" covered by both the LHWCA and state workers' compensation acts. 317 U.S. at 256. See *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 718 (1980); *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 128-129 (1962). See also *Peter* v. *Arrien*, 463 F. 2d 252 (3d Cir. 1972), aff'g 325 F. Supp. 1361 (E.D. Pa. 1971) (LHWCA coverage for a crane operator dismantling a bridge); *Travelers Insurance Co.* v. *Branham*, 136 F. 2d 873 (4th Cir. 1943) (coverage for a labor foreman building a dry dock); *Hardaway Contracting Co.* v. *O'Keefe*, 414 F. 2d 657 (5th Cir. 1968) (coverage for a laborer building a bridge).

Moreover, the critical point is that *all* workers employed on the water were traditionally covered under the federal Act. See *Boudreaux* v. *American Workover, Inc., supra*, 680 F. 2d 1043, 1045. This fact is revealed by the very legislative history upon which Perini relies (Resp. Br. 22-23). In the debates preceding enactment of the 1972 amendments, Representative Steiger posed the following question and answer to explain the coverage provision:

> Q. The present law *covers employees working on navigable waters*. Do the amendments change the scope of coverage?
>
> A. Yes. The present law's *coverage is limited to employees working on navigable waters*, including those working on dry docks. The amendments will *extend* coverage to wharfs, terminals, marine railways and other [such] adjoining areas * * *.

118 Cong. Rec. 36385 (1972) (emphasis added).

In short, it is irrefutable that workers injured upon navigable waters, like claimant Churchill, were "traditionally covered" under the pre-1972 Act. Perini has pointed to

nothing in the legislative history of the 1972 amendments to establish that Congress intended to withdraw that traditional coverage under the amendments.

4. Perini seeks to defend the "significant relationship to navigation or commerce" test utilized below by re-writing the long, tortured history of that test under the pre-1972 Act. Perini asserts that "the 'navigation or commerce' test had a settled meaning within the context of the Act prior to 1972," citing early district court cases that attempted to define the phrase (Resp. Br. 35). As we demonstrated in our opening brief (Pet. Br. 13-18), however, the "navigation or commerce" test proved completely unworkable under the original Act. Courts using the test to separate injuries covered by the federal Act from "maritime-but-local" injuries covered by state workers' compensation acts soon faced a mountain of confusing—and conflicting—precedents. *Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 119; *Davis* v. *Department of Labor, supra*, 317 U.S. at 253 n.2. See also cases cited at 4 A. Larson, *The Law of Workmen's Compensation* § 89.22 (1981). This Court finally discarded the test in *Davis* v. *Department of Labor, supra*, and *Calbeck* v. *Travelers Insurance Co., supra*. See *Boudreaux* v. *American Workover, Inc., supra*, 680 F. 2d at 1043 ("*Calbeck* ended thirty-five years of confusing and unworkable judicial interpretations * * *.") After years of litigation, the contours of the "navigation or commerce" test "ha[d] remained necessarily vague and uncertain" (*Calbeck* v. *Travelers Insurance Co., supra*, 370 U.S. at 124), thereby frustrating the congressional intent "to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy" (*id.* at 124). See G. Gilmore & C. Black, *The Law of Admiralty* 425 (2d ed. 1975) (describing the situation under the "maritime-but-local" test as "undesirable in the highest degree" for the administration of the Act).

This Court in *Sun Ship, Inc.* v. *Pennsylvania*, 447 U.S. 715, 720 (1980), recently recounted the havoc created by the "maritime-but-local" doctrine's reliance on the "navigation or commerce" test. In *Sun Ship*, the Court concluded that Congress did not intend to preempt state workers' compensation legislation when it extended coverage ashore in 1972. The Court reasoned that such an interpretation would "resurrect[] the jurisdictional montrosity that existed before the clarifying opinions in *Davis* and *Calbeck*" (447 U.S. at 720).[10] That "jurisdictional monstrosity," however, is revived by the opinion below. As the Fifth Circuit noted in *Boudreaux* v. *American Workover, Inc., supra*, 680 F. 2d at 1051 (ci ..ions omitted), the attempt "to determine case by case whether an on-water injury occurs in an employment with a 'realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters,' * * * involves the same difficulties and disagreements in determinations * * * as did the unworkable case by case determination in the 'maritime but local' test of whether the employment had a 'direct relationship to navigation or commerce,' * * * that was rejected by *Davis* and *Calbeck*."

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[10]Perini contends (Resp. Br. 38) that *Sun Ship* does not support the Director's position that the 1972 amendments provide federal coverage for all employment-related injuries on the water. *Sun Ship*'s reasoning, however, squarely applies here. The concurrent jurisdiction rule of *Davis* and *Calbeck* was applied only by analogy in *Sun Ship*, which concerned injuries ashore. The instant litigation, by contrast, presents the precise question answered in *Davis* and *Calbeck*—*i.e.*, whether certain injuries afloat are covered only by state laws because they are not directly related to navigation or commerce.

"Any legislative scheme that compensates workmen or their families for industrial mishaps should be capable of simple and dependable enforcement." *Davis* v. *Department of Labor, supra*, 317 U.S. at 258 (Frankfurter, J., concurring). The "navigation or commerce" test was unmanageable under the 1927 Act. It has shown itself to be no more well mannered under the 1972 amendments,[11] and should not be embraced by this Court.[12]

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[11] As succinctly stated by the Fifth Circuit in *Boudreaux*, the "navigation or commerce" test under the 1972 amendments "has produced sharp disagreement as to whether under particular facts the on-water employment indeed had the talismanic 'significant relationship' " (680 F. 2d at 1047; footnote omitted). See, *e.g.*, Pet. Br. 39-41.

[12] Perini argues (Resp. Br. 31-33), incorrectly, that use of the "navigation or commerce" test under the LHWCA is supported by *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972), which utilized such a test to define federal admiralty jurisdiction under 28 U.S.C. 1333(1). See also *Foremost Insurance Co.* v. *Richardson*, No. 80-2134 (June 23, 1982). As the en banc Fifth Circuit held in *Boudreaux*, however, the *Executive Jet* test is "entirely inapposite" to the statutory construction issue of coverage under the LHWCA: "Unlike *Executive Jet*, which involved no specific legislation addressed to the issue, here the LHWCA both in its 1927 enactment and its 1972 revision provided for coverage of injuries in 'maritime employment' occurring 'upon the navigable waters of the United States,' which the Court in *Calbeck* had interpreted to include all injuries in the course of employment upon the navigable waters." 680 F. 2d at 1050; 1A *Benedict on Admiralty* § 17, at 2-6 n.6 (7th ed. 1981). See also Pet. Br. 32-33 n.15. In light of the history of the discarded "navigation or commerce" test under the 1927 Act, it is clear that Congress intended "maritime employment" under the amended Act to include all employment injuries on the water.

For the foregoing reasons and the reasons stated in the Director's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

DOJ-1982-09

Docket Sheet

NO. 81-897-CFX	TITLE Director, Office of Workers' Compensation Programs, United States Department of Labor, Petitioner v. Perini North River Associates, et al.

DOCKETED	COURT
Nov. 12, 1981	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: David MacRae Wagner, John J. Fischer
Sept. 3, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until November 13, 1981 by Marshall, J, September 8, 1981.
Nov. 12, 1981	Petition for writ of certiorari filed. (Record filed).
Dec. 3, 1981	Brief of respondent Raymond Churchill in support of petition filed.
Dec. 7, 1981	Order extending time for respondents Perini North River Associates and Hartford Accident & Idemnity Company to file a response to the petition until Jan. 8, 1982.
Jan. 11, 1982	Brief for the respondents in opposition filed.
Jan. 13, 1982	DISTRIBUTED. 2-19.
Jan. 28, 1982	Reply brief for the petitioner filed. (D).
Feb. 22, 1982	Petition GRANTED .

Apr. 7, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until May 7, 1982.
May 7, 1982	Joint appendix filed.
May 7, 1982	Brief for the petitioner filed.
June 3, 1982	Order extending time to file the respondents' brief on the merits until July 2, 1982.
July 2, 1982	Brief of respondent Raymond Churchill filed.
July 6, 1982	Brief of respondents Perini North River Associates and Hartford Accident and Indemnity Company filed.
July 28, 1982	Motion of respondent Raymond Churchill for divided argument filed.(MOTION WITHDRAWN 8/6/82).
Aug. 5, 1982	Motion of the Solicitor General for divided argument filed.
Aug. 17, 1982	CIRCULATED.
Aug. 26, 1982	Motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to argue pro hac vice filed.
Sept. 9, 1982	The motion of the Solicitor General for divided argument is DENIED. The motion of the Solicitor General to permit Richard G. Wilkins, Esquire, to present oral argument pro hac vice is GRANTED.
	(Over)

81-897

Title

No.

DATE	PROCEEDINGS AND ORDERS
Sept. 17, 1982	Reply brief for the petitioner filed. (D).
Oct. 4, 1982	ARGUED.